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More Noise from the Tower of Babel: Making "Sense" Out of *Reves v. Ernst & Young*

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I. INTRODUCTION

No federal crime has generated more controversy than RICO.[1] From ambitious, but narrowly focused beginnings,[2] RICO has become a powerful tool.[3] Its amorphous structure has allowed it to be used against many "deserving" defendants,[4] building political support despite efforts at legislative reform.[5] However, RICO's flexibility comes at a cost. RICO's critics claim that the statute has been abused, especially by civil RICO plaintiffs attracted by its treble damages and attorney fee provisions.[6] While the United States Attorney's office has adopted guidelines to prevent abuse,[7] critics claim that the

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[1] 18 U.S.C. §§ 1961–1968 (1988). *See* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, *passim* (1990).

[2] *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 662 n.7 (1987). *See also* 116 CONG. REC. 35,204 (1970) (Rep. Mikva stated that the purpose of RICO was to control organized crime in the United States.).

[3] *See* Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 169 nn.10–11 (1980).

[4] *See* Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 674 (1990) (discussing constituencies for RICO). *See also* G. Robert Blakey et al., *What's Next?: The Future of RICO*, 65 NOTRE DAME L. REV. 1073, 1084 (1990) ("If ever there was a case outside of the organized crime area that seemed appropriate for RICO prosecution, it is the case against Milken & Drexel." (citing CONNIE BRUCK, THE PREDATORS' BALL 370 (1989))).

[5] *See* William J. Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639, 642–46 (1990) (discussing the failure of RICO reform). Supporters of RICO reform include, but are not limited to, the following organizations: The American Bar Association, National Association of Manufacturers, American Civil Liberties Union, United States Chamber of Commerce, AFL-CIO, American Institute of Certified Public Accountants, Securities Industry Association, American Bankers Association, Independent Bankers Association of America, Future Industries Association, American Council of Life Insurance, Credit Union National Association, Grocery Manufacturers of America, National Automobile Dealers Association, State Farm Insurance Companies, Alliance of American Insurers, and the American Financial Services Association. *Id.* at 640.

[6] *See* Leigh Ann McKenzie, Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566, 572 (1985). Critics claim that RICO encourages frivolous lawsuits because it offers a private plaintiff the advantages of a federal forum and the prospect of treble damages and attorney's fees. *Id.*; *see also* L. Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050, 1065 (1990) (arguing that the threat of a RICO suit often coerces innocent defendants in a civil suit to settle).

[7] *See* Dennis, *supra* note 4, at 665 (discussing approval procedures for government use of RICO); *see generally* CRIMINAL DIV., U.S. DEP'T OF JUSTICE, UNITED STATES

government has brought marginal prosecutions, lured by RICO's procedural advantages and stepped-up penalty provisions.[8]

The Supreme Court has contributed to the proliferation of RICO cases. Prior to 1993, when the Court decided *Reves v. Ernst & Young*,[9] the Court had reviewed only four cases involving RICO's substantive provisions.[10] In all four cases, the lower federal courts had limited RICO's broad language only to be reversed by the Supreme Court which adopted broad readings of RICO's statutory concepts.[11]

In *Reves*, the Court, for the first time, affirmed a decision in which a lower federal court had given a narrowing interpretation to one of RICO's substantive provisions.[12] *Reves* held that accountants who prepared an audit report for a farmers' cooperative did not "conduct" or "participate in the conduct" of the affairs of the farmers' cooperative for purposes of RICO.[13] The Court purported to rely on RICO's plain language despite the fact that federal circuits had developed four distinct definitions of "conduct" or "participate in the conduct."[14] As a result, it is hard to understand *Reves* as an interpretation of

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ATTORNEY'S MANUAL (1989) (discussing the prima facie case for a RICO violation).

[8] *See* Tarlow, *supra* note 3, at 170.

[9] 113 S. Ct. 1163 (1993) (holding that in order for a defendant to be guilty under RICO he or she must have participated in the operation or management of the enterprise).

[10] H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) (holding that in order to prove a pattern of racketeering activity under RICO, a plaintiff or prosecutor must show at least two racketeering predicates that are related and that amount to, or threaten the likelihood of continued criminal activity); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (holding that there was no support in the statute's history, language, or consideration of policy for a requirement that a private treble damages action could proceed only against a defendant who has already been criminally convicted. The Court also held that no "racketeering injury" is required.); Russello v. United States, 464 U.S. 16 (1983) (holding that interests subject to forfeiture under 18 U.S.C. § 1963(a)(1) (1976) are not limited to interests in the enterprise and include "profits" and "proceeds"); United States v. Turkette, 452 U.S. 576 (1981) (holding that RICO "enterprise" applies to both legitimate and illegitimate organizations).

[11] *See infra* notes 70–111.

[12] *Reves*, 113 S. Ct. at 1173–74, *aff'd sub nom.* Arthur Young & Co. v. Reves, 937 F.2d 1310 (8th Cir. 1991).

[13] 18 U.S.C. § 1962(c) (1988); *Reves*, 113 S. Ct. at 1173.

[14] *Reves*, 113 S. Ct. at 1169; *see* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991); Bennett v. Berg, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983); United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983); United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *see also* Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986). *Bank of America* may demonstrate a fifth approach to defining 18 U.S.C. § 1962(c) terms "conduct"

clear statutory language.

Reves is permeated with important policy considerations. For example, plaintiffs in cases like *Reves* sue professionals because the primary wrongdoers are often insolvent.[15] The professionals' culpability may be minor when compared to that of the primary wrongdoers. However, under principles of joint and several liability, the professionals are still liable for full damages, trebled.[16] Another unstated concern may have been the expanding use of RICO in cases involving securities fraud, an area exhaustively regulated by Congress.[17] Broad interpretation of RICO can threaten "fundamental precepts" of specialized areas of the law, "dramatically alter[ing] our legal terrain" without evidence that Congress intended to do so.[18] But even judged by the Court's other RICO decisions, which were usually silent on policy implications of the Court's holding, *Reves* left untouched significant policy questions.[19]

This Article reviews RICO's treatment in earlier Court decisions to explain why the *Reves* Court may have decided to limit RICO.[20] Insofar as *Reves* was intended to limit RICO, it takes only a tentative step toward that goal. Although the Court defined the "conduct" and "participate in the conduct" language, it did so in a case in which the underlying predicate offenses involved omission liability under the securities law.[21] The Court left unresolved significant questions involving the breadth of its own decision.[22]

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and "participate in the conduct." *Bank of America*, 782 F.2d at 970. *Bank of America* rejected *Bennett*'s "operation" or "management test"; *Bank of America* supported its holding based on the decision in United States v. Martino, 648 F.2d 367, 402–03 (5th Cir. 1981), *cert. denied*, 456 U.S. 947 (1982), that "conduct" "simply means the performance of activities necessary or helpful to the operation of the enterprise." *Id.* It is unclear whether the test employed in *Martino* is the same as the test employed in *Scotto*. *Martino*, 648 F.2d at 402–03.

[15] *See generally Reves*, 113 S. Ct. at 1168; *Bank of America*, 782 F.2d at 968 (The primary wrongdoer, International Horizons, filed for bankruptcy before suit was filed.).

[16] *See, e.g.*, Fleischhauer v. Feltner, 879 F.2d 1290, 1300 (6th Cir. 1989) (holding that the nature of the RICO offense mandates joint and several liability), *cert. denied*, 493 U.S. 1074 (1990).

[17] *See Yellow Bus Lines, Inc.*, 913 F.2d at 956–57 (Mikva, J., concurring) (discussing the extent of federal securities regulation); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 523 (1985) (Marshall, J., dissenting).

[18] *Yellow Bus Lines, Inc.*, 913 F.2d at 955.

[19] *See infra* part V.B.

[20] *See infra* notes 81–111.

[21] *See infra* notes 147–51.

[22] Reves v. Ernst & Young, 113 S. Ct. 1163, 1173 n.9 (1993). The first question left open by the Court is the following: While rejecting a restrictive "upper management" test, the Court left open how far down the ladder liability runs. *Id.* The Court left open a second question when it stated in dicta that "[a]n enterprise also might be 'operated' or 'managed'

Given the unresolved issues and the Court's unwillingness to address important policy considerations, lower federal courts and commentators have differed widely on *Reves*' meaning.[23] This Article examines post-*Reves* decisions and argues that courts have demonstrated more hostility towards civil RICO than fidelity to *Reves*. This Article highlights two lines of post-*Reves* decisions: the first, which reads *Reves* as having created a rule exempting providers of professional services from liability under § 1962(c);[24] the second, which interprets *Reves* as requiring an individual to have responsibility for directing another person in order to be liable under § 1962(c).[25] Both lines of post-*Reves* decisions seriously misconstrue *Reves* and are inconsistent with RICO's history.

Questions left open by *Reves* will necessitate a reexamination of the Court's decision.[26] This Article concludes by urging a framework of analysis for § 1962(c) that would return RICO more closely to specific situations contemplated by RICO's drafters.[27] Specifically, depending on how the Court interprets the "operation" part of its "operation or management" test, the Court may exempt from liability some of the Mafia foot soldiers whom Congress certainly intended to include within RICO's substantive provisions.[28] This Article argues that many of the analytical problems under § 1962(c) can be resolved consistent with legislative history by focusing on the appropriate mens rea. Imposing a mens rea requirement is consistent with the language and intent of the statute and provides more comprehensive limitations on RICO than those

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by others 'associated with' the enterprise who exert control over it or, for example, by bribery." *Id.* at 1173. The observation invites more questions than it answers. For example, are some bribers so influential that they really manage the enterprise, while other bribers have too little influence to come within 18 U.S.C. § 1962(c)? Or are all bribers who meet other requirements of § 1962(c) within the Court's management test simply by their act of bribery? The Court also suggested a third question of uncertainty when it stated that § 1962(c) "cannot be interpreted to reach complete 'outsiders.'" *Id.* At the same time, the Court stated that § 1962(c) does reach those outsiders who do manage the affairs of the enterprise. *Id.* The Court gives little guidance to explain how an outsider may violate § 1962(c) other than by stating that it covers those who manage the enterprise's affairs. *Id.* at 1173, 1178. However, this is a largely circular explanation. The Court also left open whether a person who does not manage or operate the enterprise may nonetheless be found liable as an accomplice or co-conspirator. *Id.* at 1169–70.

[23] *See infra* part VI.

[24] *See infra* part VI.A.

[25] *See infra* part VI.B.

[26] *See* G. Robert Blakey & Marc Haefner, *Did* Reves *Give Professionals a Safe-Harbor Under RICO?*, CIV. RICO REP., Aug. 11, 1993, at 1.

[27] *See infra* part VII.

[28] *See infra* part II.

imposed by *Reves*' tortured analysis.[29]

II. RICO IN CONGRESS

RICO grew out of almost twenty years of concern about the Mafia's influence. Congressional interest in the Mafia in America began in earnest in the early 1950s with Senate hearings chaired by Estes Kefauver.[30] His committee concluded that "[t]here is a Nation-wide crime syndicate known as the Mafia, whose tentacles are found in many large cities."[31] That view was confirmed in November 1957, when New York police broke up a meeting of Mafia family bosses being held at a Mafioso's estate in Apalachin, New York.[32]

In the early 1960s, Congress received additional confirmation of the existence and power of the Mafia or La Cosa Nostra when Mafioso Joseph Valachi turned informant. Valachi's story became part of the national understanding of La Cosa Nostra with the publication of Peter Maas' best seller *The Valachi Papers*.[33] *The Valachi Papers* demonstrated that the evil created by the Mafia was not simply the commission of discrete criminal acts. The Mafia was a way of life, involving individuals initiated into a structured life of crime, sworn to commit murder in the name of business.[34] Mafia members demonstrated flexibility in making money, whether by cheating the government

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[29] *See infra* part VII.

[30] SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, 3D INTERIM REP., S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951) (known as the Kefauver Commission).

[31] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 1 n.1 (1967) [hereinafter TASK FORCE REPORT] (citing SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, 3D INTERIM REP., S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951)).

[32] *See* TASK FORCE REPORT, *supra* note 31, at 32; *see also* United States v. Bonanno, 683 F. Supp. 1411 (E.D.N.Y. 1988), *aff'd*, 879 F.2d 20 (2d Cir. 1989); United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

[33] PETER MAAS, THE VALACHI PAPERS (1968); *see* Wendy Smith, *How Time Has Diminished the Clout of Capone*, NEWSDAY, July 3, 1989, at 4 (identifying *The Valachi Papers* as a best selling book).

[34] *See* TASK FORCE REPORT, *supra* note 31, at 1 n.2 (describing that the core of organized crime is the supplying of illegal goods and services—gambling, loan sharking, narcotics, and other forms of vice—to countless numbers of citizen customers) (citing Johnson, *Organized Crime: Challenge to the American Legal System* (pts. 1–3), 53 J. CRIM. L., L. & P.S. 399, 402–04 (1962), 54 J. CRIM. L., L. & P.S. 1, 127 (1963)). But organized crime is also extensively and deeply involved in legitimate business and in labor unions. TASK FORCE REPORT, *supra* note 31, at 1 n.2.

during wartime by selling black-market gasoline rations, by running illegal gambling or prostitution operations, or by selling drugs.[35]

In 1965, President Johnson signed an executive order creating the President's Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission) to study organized crime.[36] The Katzenbach Commission's report led to the eventual passage of The Organized Crime Control Act of 1970 and presents strong evidence of the evil that Congress attempted to address when it enacted RICO.[37]

The Katzenbach Commission, although not without some vacillation, focused on "an entity with particular members, a defined hierarchy, and even an official name."[38] La Cosa Nostra was not only dangerous because of its size but also because of its infiltration into legitimate businesses and into labor organizations. The Commission's report was not concerned generally with the cost of crime on American society but specifically with the special harm associated with organized crime that used its economic power to "undermine free competition."[39] Organized crime was especially dangerous because it sought monopoly power by force and by investment in "legitimate, [economic], and political activities."[40]

The Commission went beyond the stereotype of the Mafia as

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[35] *See* MAAS, *supra* note 33, at 185–94.

[36] *See* Lynch, *supra* note 2, at 666; TASK FORCE REPORT, *supra* note 31, at 1.

[37] *See* Lynch, *supra* note 2, at 666.

[38] *Id.* at 668.

> Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the Nation. Their membership is exclusively Italian, they are in frequent communication with each other, and their smooth functioning is ensured by a national body of overseers. . . . FBI intelligence indicates that the organization as a whole has changed its name from the Mafia to La Cosa Nostra.

Id. (citing TASK FORCE REPORT, *supra* note 31, at 6–10).

[39] TASK FORCE REPORT, *supra* note 31, at 5; *see also* Johnson, *Organized Crime: Challenge to the American Legal System* (pt. 1), 53 J. CRIM. L., L. & P.S. 399, 406–07; Lynch, *supra* note 2, at 669; RONALD GOLDSTOCK, NEW YORK STATE ORGANIZED CRIME TASK FORCE, INTERIM REPORT, CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY 8 (1987) (presenting dramatic evidence of the continuing economic power of organized crime). Donald Cressey's working paper was more specific: "The danger of organized crime arises because the vast profits acquired from the sale of illicit goods and services are being invested in licit enterprises, in both the business sphere and the governmental sphere." Donald R. Cressey, *The Functions and Structure of Criminal Syndicates*, *in* TASK FORCE REPORT, *supra* note 31, at 25.

[40] Cressey, *supra* note 39, at 25.

unsophisticated hoodlums. The Mafia had matured so that it no longer had to rely as much as it once did on "hoods." It ran its affairs "more like a big business, a cartel."[41] The Commission underscored that the Mafia's economic success was the result not only of muscle and murder but also of power gained through monopolization, tax evasion,[42] real estate ventures,[43] and manipulation of law enforcement and the courts.[44] The wealth generated by such illegal activities was estimated to be in the billions of dollars. The Commission's report left no question that "[t]o succeed in such ventures, [the Mafia] uses accountants, attorneys, and business consultants, who in some instances work exclusively on its affairs."[45] As explained by Donald Cressey, the maturation of the Mafia required ceding power to professionals.[46]

While the Katzenbach Commission made no recommendations for substantive reform,[47] the substantive RICO offenses were the culmination of a series of proposed bills.[48] Early in the legislative process, Senator Hruska introduced two bills, "generally considered ancestors of RICO."[49] In introducing the legislation, he identified organized crime, the monolithic Mafia, as a specific evil to be combated by that legislation.[50] Similar to the Katzenbach Commission, his other primary concern was the infiltration of legitimate businesses, even though his proposed legislation was not narrowly confined to the evils that he decried.[51]

During the next Congress, Senator McClellan introduced legislation also based on the Katzenbach Commission report, emphasizing procedural and evidentiary reform. Like Senator Hruska and the Commission, Senator McClellan identified the primary evils to be twofold: the threat of the

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[41] *Id.* at 53. According to Cressey, "[w]e are now witnessing the passing of the days when the rulers of organized crime had to devote most of their time and intelligence to insuring that their members were not bad criminals." *Id.*

[42] *See* TASK FORCE REPORT, *supra* note 31, at 1.

[43] *See id.* at 4; *see also* MAAS, *supra* note 33, at 185–94; Cressey, *supra* note 39, at 54 (describing the role of the "Money Mover" whose role was to launder illicit profits into other investments including "[i]mporting, real estate, trust funds, books, stocks and bonds").

[44] *See* TASK FORCE REPORT, *supra* note 31, at 8.

[45] *Id.* at 4.

[46] *See* Cressey, *supra* note 39, at 51.

[47] *See* TASK FORCE REPORT, *supra* note 31, at 16. The laws of conspiracy have provided an effective substantive tool to confront the criminal groups. *Id.*

[48] *Id.*

[49] Lynch, *supra* note 2, at 673.

[50] *See id.*

[51] *See id.* at 674.

monolithic Mafia and its infiltration into legitimate businesses.[52]

RICO was largely modeled on a bill proposed in 1969 by Senators Hruska and McClellan.[53] The bill, according to Senator McClellan, was aimed at ridding organized crime of its influence over legitimate businesses.[54] A universal agreement exists that organized crime, and specifically the Mafia, was the primary target of the legislation.[55] Despite these concerns, RICO as enacted contains neither a definition of organized crime,[56] nor specific language limiting RICO to infiltration of legitimate businesses.[57]

Perhaps because the task seemed daunting,[58] Congress did not attempt to define in general terms the structural features of organized crime.[59] Instead, RICO outlawed what the Mafia did,[60] but the functional approach to criminalizing organized crime invited an open-ended statute.[61] If nothing else was learned from *The Valachi Papers* and hearings into the conduct of the Mafia, it was that the Mafia was enormously adaptable, adopting almost any strategy to make money.[62] RICO would be rendered ineffective if organized crime was defined in terms of the old standby crimes associated with the Mafia, crimes like prostitution, gambling and murder for hire. The Mafia would simply move its operation into new money-making ventures.[63]

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[52] *See id.* at 675.

[53] *See id.* at 676.

[54] *See id.* at 677.

[55] *See id.* at 669 (identifying that the primary target of RICO was organized crime).

[56] *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 247 (1989).

[57] United States v. Turkette, 452 U.S. 576, 593–94 (1981) ("Undoubtedly, the infiltration of legitimate business was of great concern . . . ."). With regard to the organized crime limitation, RICO almost necessarily had to be defined in broad terms. As pointed out by Attorney General Katzenbach, outlawing membership in La Cosa Nostra would almost certainly violate the Constitution. Crovitz, *supra* note 6, at 1052.

[58] *See* Lynch, *supra* note 2, at 685; Jonathan Turley, *The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO*, 33 VILL. L. REV. 239, 241 n.12 (1988) ("RICO's drafters consciously avoided defining such terms as 'organized crime' or 'organized criminal' for both practical and strategic reasons. Practically, such a definition was thought to be fraught with constitutional and even racial difficulties . . . .").

[59] *See* Lynch, *supra* note 2, at 687–88.

[60] *See id.* at 669, 920, 930.

[61] *See generally* TASK FORCE REPORT, *supra* note 31, at 4–5. Senator McClellan stated that organized criminals are "sufficiently resourceful" to make impossible "an effective statute that reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." 116 CONG. REC. 18,940 (1970).

[62] *See* MAAS, *supra* note 33, at 185–94.

[63] *See* TASK FORCE REPORT, *supra* note 31, at 4–5; *see also* Cressey, *supra* note 39, at

Subsequent debate about RICO has focused on whether Congress intended to limit its application to organized crime.[64] However, Congress had a distinct impression of how the Mafia was organized and conducted its business.[65] Congress clearly intended to criminalize that conduct.[66] Debate over whether RICO is limited to organized crime has been heated,[67] but it has never been doubted that organized crime, that is, the Mafia, was its primary target.

III. RICO IN THE COURTS

Plaintiffs and prosecutors were slow to use RICO, probably because they assumed that RICO was limited to organized crime's infiltration into legitimate businesses.[68] When that changed in the mid-1970s,[69] courts divided on RICO's application. A number of lower federal courts attempted to limit RICO. For example, some lower federal courts found that RICO required a showing that the defendant was engaged in organized crime.[70] Other lower federal courts held that RICO was inapplicable to wholly illegitimate businesses.[71] Other federal courts held that for purposes of § 1962(c), a prosecuting party had to demonstrate that the racketeering business was operated for economic gain.[72] Still other federal courts limited RICO's application by defining "pattern"

51–56; Lynch, *supra* note 2, at 684, 687.

[64] Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 802 (1990).

[65] *See supra* part II.

[66] United States v. Turkette, 632 F.2d 896, 900 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981).

[67] *See generally* Blakey et al., *supra* note 4, at 1073.

[68] *See* Dennis, *supra* note 4, 673–74.

[69] *Id.*

[70] The following courts held that only those activities with some connection to organized crime may be the subject of civil RICO suits. *See* Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 643 (C.D. Cal. 1983); Waterman S.S. Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E.D. La. 1981); Noonan v. Granville-Smith, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 112 (S.D.N.Y. 1975).

[71] *See, e.g.*, United States v. Turkette, 632 F.2d 896, 905–06 (1st Cir. 1980) (holding that a RICO indictment against someone participating in only criminal activities was invalid), *rev'd*, 452 U.S. 576 (1981); *see also* United States v. Sutton, 642 F.2d 1001, 1006–09 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981); United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

[72] *See, e.g.*, United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir.) (holding that for purposes of RICO, an enterprise must be directed toward an economic goal), *cert. denied*, 488 U.S. 944 (1988); *see also* United States v. Bagaric, 706 F.2d 42, 53 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

restrictively.[73]

Those decisions could cite ample legislative history that identified the specific goals of RICO's drafters and could plausibly conclude that a narrow interpretation of the statute was necessary to limit RICO to those goals.[74] Further, the cases before the courts often posed difficult policy questions militating in favor of imposing limitations on RICO. For example, in *Sedima, S.P.R.L. v. Imrex Co.*, the Second Circuit recognized that a broad reading of RICO would allow plaintiffs to "bring into federal courts many claims formerly subject only to state [court] jurisdiction, and to bypass remedial schemes created by Congress."[75] The *Sedima* court was also concerned that a liberal interpretation would result in a significant shift in federal-state relations without clear legislative intent supporting that shift.[76]

The First Circuit identified similar policy concerns in *United States v. Turkette*.[77] In holding that § 1962(c) applied only to the operation of a legitimate business through a pattern of racketeering, the court rejected the government's "simplistic and literal interpretation" of the law.[78] The *Turkette* court explained that adopting the government's approach to the definition of a RICO enterprise would make RICO boundless and would allow prosecutors to usurp state criminal law jurisdiction because it would equate a RICO violation to nothing more than a state law conspiracy.[79] As the court in *Sedima*, the *Turkette* court was not willing to infer such a result without stronger evidence of congressional intent to alter federal and state law enforcement responsibilities.[80]

Despite important policy concerns, efforts to limit RICO met with no success in the Supreme Court. Prior to *Reves*, the Court decided four cases interpreting RICO's substantive provisions; in each, the lower federal courts

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[73] *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), *rev'd*, 492 U.S. 229 (1989); Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986).

[74] *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985); *see also* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984).

[75] 741 F.2d at 486, *rev'd*, 473 U.S. 479 (1985).

[76] *See id.*; *see also* Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347, 1361 (1983); RICO Cases Committee, *A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation*, 1985 A.B.A. SEC. CRIM. JUST. 8.

[77] 632 F.2d 896, 903–04 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981).

[78] *Id.* at 903.

[79] *See id.* at 904.

[80] *See id.*; Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 955 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991) (expressing concern that the broad interpretation of RICO may "work a major restructuring of our legal landscape"); *see also* Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 643–44 (C.D. Cal. 1983).

limited RICO, only to be reversed by the Supreme Court.[81] *Turkette*[82] was the first RICO case decided by the Court and would set the tone for the Court's later RICO cases.

The First Circuit in *Turkette* held that a RICO enterprise encompassed only legitimate enterprises, not wholly illicit ones.[83] That holding found support in RICO's history[84] and in § 1961(4) of the Act, which states that "enterprise" includes any partnership or corporation or any "other legal entity,"[85] all of which are presumptively legitimate organizations. The First Circuit also supported its holding in *Turkette* by reference to concerns about federal-state relations and the almost boundless effect of reading RICO literally.[86]

The Supreme Court gave short shrift to the policy concerns expressed by the First Circuit in *Turkette*. The Court acknowledged that infiltration of legitimate organizations was RICO's primary but not exclusive goal.[87] In reversing the First Circuit, the Court relied almost exclusively on RICO's broad language and found no support in the plain language of the statute to support a distinction between illegitimate and legitimate enterprises.[88] The Court found support in the legislative history that Congress considered and rejected concerns about intrusion into state criminal law enforcement areas.[89] The Court did not address the additional concern about the boundless nature of

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[81] *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) (holding that in order to prove a pattern of racketeering activity under RICO, a plaintiff or prosecutor must show at least two racketeering predicates that are related and that amount to, or threaten the likelihood of, continued criminal activity); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (holding that there was no support in the statute's history, language, or considerations of policy for a requirement that a private treble damages action could proceed only against a defendant who had already been criminally convicted. Thus, given the facts, Sedima's action was not barred. The Court also concluded that no "racketeering injury" is required.); Russello v. United States, 464 U.S. 16 (1983) (holding that interests subject to forfeiture under 18 U.S.C. § 1963(a)(1) are not limited to interests in the enterprise and include "profits" and "proceeds"); United States v. Turkette, 452 U.S. 576 (1981) (holding that RICO "enterprise" applies to both legitimate and illegitimate organizations).

[82] 452 U.S. at 576.

[83] *See Turkette*, 632 F.2d at 909.

[84] *See id.* at 901–02.

[85] 18 U.S.C. § 1961(4) (1984). In the most significant scholarly article examining RICO's history, Professor Lynch concluded, consistent with the First Circuit's holding in *Turkette*, that Congress intended to reach only legitimate organizations. Lynch, *supra* note 2, at 675–77.

[86] *Turkette*, 632 F.2d at 903.

[87] *See* United States v. Turkette, 452 U.S. 576, 590 (1981).

[88] *Id.* at 590.

[89] *Id.* at 586.

RICO, other than to suggest in passing that RICO was intended "to . . . eradicate . . . organized crime in America."[90]

Had the Court adopted the First Circuit's view, RICO would have been a minor device in the prosecutor's arsenal. However, by 1981, prosecutors had discovered that RICO was an effective crime fighting weapon against all kinds of defendants.[91] RICO would have been severely limited because most RICO prosecutions involve wholly illegitimate or largely illegitimate associations of individuals.[92] That may explain but does not justify ignoring legislative history and other significant policy concerns raised by a broad reading of RICO. The Court's liberal construction of RICO also contributed to the proliferation of RICO actions.

The idea that RICO may be limited to organized crime was short lived. In *Sedima*, the Second Circuit found that a civil RICO plaintiff could bring an action only after a defendant had been convicted on criminal charges and could recover only for a "racketeering injury."[93] The Second Circuit, in *Sedima*, had adopted the "racketeering injury" limitation to prevent RICO's "extraordinary, if not outrageous"[94] uses and to bring its application in line with RICO's general purposes. The Supreme Court rejected the limitations imposed by the Second Circuit.[95]

The Court relied on RICO's literal language and broad remedial purposes. However, now it found that RICO was "an aggressive initiative to . . . develop

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[90] *Id.* at 589. *Russello* made a similar suggestion that RICO might be limited to organized crime. Russello v. United States, 464 U.S. 16, 24 (1983). However, as in *Turkette*, *Russello* gave a broad reading to the statutory term under consideration. *Id.*

[91] *See* Dennis, *supra* note 4, at 662; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488 (1985).

[92] *See* G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VAND. L. REV. 851, 896 (1990). As overheard on a wiretap, one mobster explained the meaning of RICO to a cohort: "[I]f they don't prove that a legitimate business was infiltrated we're off the hook . . . . We can do anything we want. They can stick RICO . . . . I wouldn't be in a legitimate business for all the fuckin' money in the world to begin with." *Id.* at 869 n.12 (quoting G. O'NEILL & D. LEHR, THE UNDERBOSS: THE RISE AND FALL OF A MAFIA FAMILY 233 (1989)).

[93] Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 492 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). That limitation was not specifically rejected until H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989). However, the Court's reasoning in *Sedima* made clear that such a limitation would fail. *Sedima*, 473 U.S. at 479. *See infra* notes 96–99 and accompanying text.

[94] *Sedima*, 741 F.2d at 499.

[95] *Sedima*, 473 U.S. at 481.

new methods for fighting crime," not necessarily organized crime.[96] The Court found few statements in the legislative history relating to this general goal of fighting crime, but the Court found this goal inherent in the "overall approach" of the statute and in statements made by RICO's opponents that it would be too easy a weapon against "innocent businessmen."[97] The evolution of RICO into something apart from its original intent was a function of the breadth of RICO's provisions. The earlier suggestion that RICO would be limited to organized crime disappeared after *Sedima*.[98] If RICO was being abused, relief would have to come from Congress, not the Court.[99] As in *Turkette*, the Court in *Sedima* gave short shrift to policy concerns that had troubled the lower federal court.

The Court did suggest, however, that lower federal courts might limit RICO through the "pattern of racketeering" element. The Court observed specifically that the "'extraordinary' uses" to which plaintiffs had put civil RICO were a result of "the failure of Congress and the courts to develop a meaningful concept of 'pattern.'"[100] The Eighth Circuit attempted to do just that. In *Superior Oil Co. v. Fulmer*,[101] the court found that "pattern" required more than one continuing criminal scheme and observed that "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern' of racketeering activity."[102]

The Supreme Court rejected that argument in *H.J. Inc. v. Northwestern Bell Telephone Co.*[103] The Court's starting point was the language of the Act. "Pattern," according to the Court, requires some relationship plus continuity.[104] The Court relied on Title X of the Organized Crime Control Act for a definition of "relationship": "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[105]

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[96] *Id.* at 498.

[97] *Id.*

[98] *See id.* at 479. While the Court did not have to resolve whether RICO was limited to organized crime, much of its reasoning demonstrated that the argument would fail. That proposed limitation was finally laid to rest in H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989).

[99] *See Sedima*, 473 U.S. at 493.

[100] *Id.* at 500.

[101] 785 F.2d 252, 258 (8th Cir. 1986).

[102] *Id.* at 257 (citing Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 832 (N.D. Ill. 1985)).

[103] 492 U.S. 229 (1989).

[104] *See id.* at 237-39.

[105] *Id.* at 240.

In discussing the continuity requirement, the Court rejected the Eighth Circuit's test of multiple schemes, though it stated that proof of multiple schemes would be "highly relevant."[106] The Court found the Eighth Circuit's approach too rigid and unsupported by RICO's legislative history. The Eighth Circuit, stated Justice Brennan, defined continuity "by introducing a concept—the 'scheme'—that appears nowhere in the language or legislative history of the Act."[107] The Court also expressed doubts whether the "scheme" element would add certainty to an understanding of the "pattern" element.[108]

Despite the Court's statement that RICO's legislative history lacked support for the Eighth Circuit's requirement of multiple "schemes," RICO's legislative history does support such a requirement. Senator McClellan and others in Congress insisted that RICO was inapplicable to sporadic criminal conduct.[109] While a single scheme might involve multiple acts over a long period of time, Congress enacted RICO after consideration of the special evil represented by organized crime. Organized crime represented a threat to our national economic well-being because racketeers generated enormous illicit profits through widespread criminal activities and used economic power to develop monopoly power.[110] Mafiosi made crime a way of life, perpetrating multiple criminal schemes.[111]

Prior to *Reves*, the Supreme Court consistently rejected efforts by the lower federal courts to narrow RICO. Reliance on broad new statutory terms invited "creative" uses of RICO, however, the Court stated explicitly that reform had to come from Congress.

IV. *REVES V. ERNST & YOUNG*

Two of the Supreme Court's four RICO decisions produced sharp division within the Court. *Sedima* was decided by a 5–4 majority with a strong dissent

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[106] *Id.*

[107] *Id.* at 241.

[108] *See id.* at 253. There is some irony in Justice Brennan's view that the single-scheme concept would add confusion to the law. He has proposed a similar test in cases involving multiple prosecutions when the accused has claimed a violation of double jeopardy. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 449 (1970) (Brennan, J., concurring) (arguing that the Court should adopt a same transaction test for cases in which a defendant relies on collateral estoppel); Grady v. Corbin, 495 U.S. 508 (1990) (majority opinion authored by Brennan) (holding that a subsequent prosecution arising out of the "same conduct" as an earlier prosecution violated double jeopardy).

[109] *See* John L. McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME L. REV. 55, 62, 142–43 (1970).

[110] *See supra* notes 39–45.

[111] *See supra* notes 39–63.

by Justice Marshall.[112] While the result in *H.J. Inc.* was unanimous, it produced Justice Scalia's scathing concurring opinion in which he and three other justices suggested that RICO may be unconstitutionally vague.[113]

By 1993, three of the dissenting justices in *Sedima* had retired from the Court. At least five sitting justices, however, had expressed grave misgiving about RICO.[114] *H.J. Inc.* may have been a wakeup call that the Court was concerned about the uncontrolled use of RICO.[115] In *Sedima*, the Court had invited Congress to narrow RICO; Congress had failed to do so.[116] Important professional associations, including the American Bar Association, publicized concerns about RICO's breadth.[117] Groups with widely different political agendas called for RICO's reform.[118]

Finally, in 1993, the Court decided a case in which it adopted a lower federal court's narrowing interpretation of RICO's broad language. In *Reves*,

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[112] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (Marshall, Brennan, Blackmun & Powell, JJ., dissenting) (5–4 decision).

[113] H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) (9–0 decision). Despite the view of four justices, RICO would almost certainly withstand a vagueness challenge. *See, e.g.*, Joseph E. Bauerschmidt, Note, *"Mother of Mercy—Is This The End of RICO?"—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern"*, 65 NOTRE DAME L. REV. 1106 (1990); *see also* Frank C. Razzant, *RICO Constitutionality: Multifactor Test Gets Top Marks*, 1 NAT'L ITALIAN AM. BAR ASSOC. J. 79 (1991). Since *H.J. Inc.*, courts are virtually unanimous that RICO is not unconstitutionally vague. *Id.*

[114] The five justices include the four justices concurring in *H.J. Inc.* and Justice Blackmun, who joined Justice Marshall's dissent in *Sedima*. *See supra* notes 112–13.

[115] The view that *Reves* represents a new concern with an overbroad interpretation of RICO may be undercut by the Court's decision the following term in NOW, Inc. v. Schiedler, 114 S. Ct. 798 (1994). In *NOW, Inc.*, the Court rejected the Seventh Circuit's holding that a RICO enterprise had to have an economic motive. The result in *Schiedler* was unanimous and, as I have argued elsewhere, was an easy case in light of earlier Supreme Court decisions. Michael Vitiello, *Has the Supreme Court Really Turned RICO Upside Down?: An Examination of* NOW, Inc. v. Schiedler, 85 J. CRIM. LAW & CRIMINOLOGY 1223 (1995). For example, *Turkette* was directly on point. In both cases, the litigant argued that the court should impose a requirement on the term "enterprise" not found in the statute's express language. As in *Turkette*, the Court in *NOW, Inc.* rejected that argument. *See* United States v. Turkette, 632 F.2d 896, 910 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981); *NOW, Inc.*, 114 S. Ct. at 789.

[116] *See supra* notes 96–99.

[117] *See* RICO Cases Committee, *supra* note 76, at 9 (listing Department of Justice, the National Chamber of Commerce, and the Judicial Conference of the United States as supporters of RICO when introduced).

[118] *See supra* note 5.

plaintiff investors purchased notes of a farmers' cooperative.[119] The defendant accounting firm was hired to audit the Co-op.[120] The Co-op was in bad financial shape resulting from mismanagement and fraud of the Co-op's general manager and its accountant.[121] The Co-op's solvency at the time of the audit was dependent on how the auditors valued a gasohol plant sold to the Co-op by its general manager.[122]

The investors' claim against the accounting firm was based on the auditors' failure to tell the Co-op board of the Co-op's insolvency and on the auditors' misleading presentation at the Co-op board's 1982 and 1983 annual meetings.[123] Although the plaintiffs prevailed at trial on state and federal securities fraud theories, the district court granted the defendant's motion for summary judgment on the RICO claim and dismissed it.[124]

The complaint alleged a violation of § 1962(c), that the auditors "conducted or participated in the affairs of the Co-op, committing both mail fraud and securities fraud."[125] The district court relied on the Eighth Circuit's holding in *Bennett v. Berg*,[126] interpreting § 1962(c) as requiring that the RICO defendant participate in the operation or management of the enterprise itself. The court of appeals affirmed.[127] The Supreme Court affirmed the judgment of the Eighth Circuit.[128]

The Court began its analysis by explaining that § 1962(c) includes a repetition of the word "conduct," used both as a verb and as a noun. Section 1962(c) states that it is "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering."[129] In *Reves*, the auditors were associated with the enterprise and the Co-op, and participated in these affairs by preparing an audit and speaking at the annual meetings. The Court concluded that this was insufficient to bring the defendants within § 1962(c).[130]

The verb "to conduct," according to the majority, means "to lead, run,

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[119] Reves v. Ernst & Young, 113 S. Ct. 1163, 1168 (1993). *See also* Reves v. Ernst & Young, 937 F.2d 1310, 1315 (8th Cir. 1991).

[120] *Reves*, 113 S. Ct. at 1168.

[121] *Id.* at 1166–67.

[122] *Id.* at 1167; *Reves*, 937 F.2d at 1317.

[123] *Reves*, 113 S. Ct. at 1167–68 (discussing liability based on failure to act).

[124] *Id.* at 1168.

[125] *Reves*, 937 F.2d at 1323.

[126] 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1008 (1984).

[127] *Reves*, 937 F.2d at 1324.

[128] *Reves*, 113 S. Ct. at 1174.

[129] 18 U.S.C. § 1962(c) (1988).

[130] *Reves*, 113 S. Ct. at 1173.

manage, or direct," and thus "indicates some degree of direction."[131] Accordingly, § 1962(c) could not be read to mean only that an actor violated the section by participating in the affairs of the enterprise because that would render superfluous the noun "conduct."[132] If mere participation was intended to be enough, Congress would have made it unlawful to participate in the affairs of an enterprise, not to participate in the conduct of its affairs.[133] Hence, when used as a noun as well, "'conduct' . . . include[s] an element of direction."[134]

The Court also had to define the meaning of "participate." That term might mean nothing more than to render some assistance or to aid and abet, not requiring any management or control over the affairs of the enterprise. Instead, when read in context, one has to participate in the conduct of the affairs. But that is something less than a requirement that one conduct the affairs of the enterprise. When read along with the phrase, "directly or indirectly," it was clear to the Court "that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required."[135] According to the majority, the "operation or management" test describes § 1962(c)'s meaning and "is easy to apply."[136]

V. ANALYSIS OF *REVES*

Reves has produced confusion among lower federal courts.[137] What compounds the post-*Reves* confusion is the Supreme Court's analysis of its own test in relation to the facts of the case, a case involving omission liability under the securities laws. The Court decided an unusually narrow case in which its test was easily met.[138] But the Court left unresolved a number of significant questions, suggesting that its test is not easily applied, a conclusion supported by post-*Reves* litigation.[139]

The *Reves* Court's analysis of the convoluted statutory language produced widely different interpretations among lower federal courts. Furthermore, the Court refused to apply its test to difficult facts, inviting litigation in the wake of

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[131] *Id.* at 1169.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 1170 (footnote omitted).

[136] *Id.* The Court found additional support in the legislative history for its conclusion. *Id.*

[137] *See infra* notes 190–281 and accompanying text.

[138] *See infra* notes 147–51 and accompanying text.

[139] *See infra* notes 190–281 and accompanying text.

its decision. But *Reves* is dissatisfying for an additional reason. In light of public criticism of RICO and efforts at legislative reform,[140] the Court must have been aware of significant policy questions implicated in *Reves*. But even judged by its own unwillingness to address policy issues in its prior RICO cases, *Reves* is singularly unilluminating on those issues.

That *Reves* is the first decision upholding a narrow construction of RICO's broad language may signal that the Court is troubled by issues raised by lower federal courts,[141] the ABA,[142] and other prominent critics of RICO.[143] Given its position in cases like *Sedima*, the Court may have failed to articulate its views on those policy questions because in cases prior to *Reves* the Court left itself little maneuvering room. The Court has been loathe to overrule precedent in statutory construction cases.[144] Addressing the underlying policy concerns in *Reves* may have demonstrated that the Court now disagrees with its own holding in *Sedima* or at least with its unwillingness to limit RICO consistently with the policy concerns expressed by the Second Circuit.[145] But *Reves* was a blueprint for confusion because of its narrow holding, its refusal to address a number of more complicated questions raised but not resolved by its decision, and its total silence on its view of the policy questions implicated in *Reves*.[146]

A. Reves *as an Omission-Liability Case*

After construing the "plain meaning" of § 1962(c), *Reves* applied its own test to the facts before it. The Court found that the only basis for a finding that the auditors "participated" would have been in their failure to tell the board that the plant should have been valued differently.[147] That failure did not

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[140] *See supra* note 5.

[141] *See supra* part III.

[142] *See* RICO Cases Committee, *supra* note 76, at 9.

[143] *See supra* note 5.

[144] *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Erie R.R. v. Tompkins, 304 U.S. 64, 74–78 (1938). This is not a rule without exception. *See, e.g.*, Hubbard v. United States, 115 S. Ct. 1754 (1994).

[145] The Second Circuit was concerned about "outrageous" uses of RICO and the federalization of wide areas of common law fraud. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). By analogy, in *Reves*, the Court may have been concerned about routinely converting securities fraud cases into RICO actions, thereby altering the existing technical scheme of securities laws without clear evidence that Congress intended to alter the securities laws when it enacted RICO. Similar arguments were unavailing in *Sedima*. In the interim, Congress had been unable to reform RICO.

[146] *See infra* text accompanying notes 152–89.

[147] Reves v. Ernst & Young, 113 S. Ct. 1163, 1174 (1993).

amount to the operation or management of the Co-op's affairs. The Court rejected the dissent's argument that the auditors exercised management or control by preparing the financial statement, a responsibility considered to be managerial in nature.[148] Thus, *Reves* may be read simply as a case of a culpable omission. On that reading, one who fails to act cannot be said to "participate in the conduct of the affairs" of the relevant enterprise.[149]

Had the auditors prepared the misleading summaries or had the plaintiffs' claim for relief relied on misleading statements made by a representative of the accounting firm (rather than a failure to disclose information), or had a representative of the accounting firm made misleading statements at the board meeting, the Court may have found sufficient participation in the conduct of the Co-op's affairs. This view is supported by the Supreme Court's statements that professional standards permit accountants to rely on information given them by their clients and that the audit report did reveal the basis upon which the gasohol plant had been evaluated.[150] As characterized by the Court, *Reves* is not a case in which the auditors affirmatively deceived the public; instead, their culpability was based on their failure to correct misleading information prepared by others.[151]

B. Reves *and Unstated Policy Concerns*

In *Sedima*, the Second Circuit was concerned that without limitations imposed, RICO would convert garden variety common law fraud into a federal right of action with stepped up damages and attorneys' fees available to

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[148] *Id.* at 1167.

[149] Support for this narrow view of *Reves* is found in the Eighth Circuit's discussion of auditors' liability under federal securities laws. Reves v. Ernst & Young, 937 F.2d 1310, 1314 (8th Cir. 1991). The parties treated the basis of auditors' liability under Rule 10b-5 as omission liability. SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1994). Liability under Rule 10b-5 turned on the finding that auditors' had a duty to disclose to the investors that the financial summaries prepared by the Co-op were misleading. *Reves*, 937 F.2d at 1329–30. The financial reports prepared by the auditors did include a discussion of how the auditors determined the valuation of the gasohol plant. *Id.* at 1317–18. The Court did not explicitly limit *Reves* to cases involving omission liability. I have argued in this Article that such a limitation is implicit in part of the Court's analysis. Because the limitation was implicit, the Court did not address why RICO might not extend liability to omissions whereas the criminal law typically does so. *Cf.* United States v. Park, 421 U.S. 658 (1975) (holding that § 301(K) of the Federal Food, Drug, and Cosmetic Act creates liability for a failure to ensure against violations of the Act).

[150] *Reves*, 113 S. Ct. at 1173–74.

[151] *Id.*

successful plaintiffs.[152] The Supreme Court found that concern unavailing and concluded, instead, that any change must come from Congress.[153]

Despite considerable pressure to reform RICO after *Sedima*,[154] Congress has not acted.[155] RICO has produced extraordinary political alignments.[156] RICO's equal availability to criminal and civil defendants may explain the alliance of liberal groups urging RICO's reform like the ACLU aligning with pro-business groups like the National Association of Manufacturers and the American Institute of Certified Public Accountants. The wide array of political interests aligned on both sides of the debate may explain Congress' inability to reform RICO. With Congress suffering gridlock, pressure on the Supreme Court to limit RICO may have mounted.

Reves posed some of the same concerns present in *Sedima*. *Reves* was another decision in which professionals were drawn into civil litigation because the primary perpetrator of a fraudulent scheme was judgment proof.[157] It was another case in which RICO was used to treble damages even though no similar damages would have been available for the underlying fraud.[158] In cases like *Sedima* and *Reves*, plaintiffs have relied on securities, mail or wire fraud as the underlying predicate offenses to turn the professionals' conduct into a federal right of action.[159] Mail fraud is actionable only when it is part of a RICO "pattern of racketeering."[160] Securities fraud, even if actionable, provides more limited damages than a RICO violation.[161]

In a related context, the District of Columbia Circuit adopted the "significant control" test.[162] In *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, the court limited RICO because "[a] broader

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[152] Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 503 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

[153] *Sedima*, 473 U.S. at 499.

[154] *See, e.g.*, Susan Getzendanner, *"Judicial Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 678 (1990) (for one example of criticism of RICO).

[155] *See* Hughes, *supra* note 5, at 642–46 (discussing the failure of RICO reform).

[156] *See supra* note 5.

[157] Ralph A. Pitts et al., *Civil RICO and Professional Liability after* Reves*: Plaintiffs Will Have to Look Elsewhere to Reach the "Deep Pockets" of Outside Professionals (Part 1 of 2)*, CIV. RICO REP., Oct. 13, 1993, at 1.

[158] The Supreme Court had already ruled that the notes were securities within the meaning of 15 U.S.C. § 78c(a)(10). Reves v. Ernst & Young, 494 U.S. 56, 71 (1990).

[159] Getzendanner, *supra* note 154, at 678–79.

[160] *Id.* at 676.

[161] *See* 15 U.S.C.S. § 78r (1983) (liability for misleading statements).

[162] Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990).

reading of section 1962(c) would . . . work a major restructuring of our legal landscape."[163] In *Yellow Bus Lines*, the plaintiff sued the defendant union and its business agent and trustee. The plaintiff attempted to state a § 1962(c) claim against the union based on events surrounding a strike for union recognition.[164] The narrow test was warranted, according to the court, because to hold otherwise would upset the balance that Congress had struck in its extensive legislation in labor-management relations.[165]

Judge Mikva concurred in the en banc decision.[166] But he raised the point, alluded to above, that in light of cases like *Sedima*, it may be too late to limit RICO to avoid conflict with other areas of the law. Just as a contrary holding in *Yellow Bus Lines*, would "'RICOize'" labor law, "*Sedima* has already federalized many aspects of state fraud law."[167] That is, Judge Mikva doubted that principled lines could be drawn to prevent RICO from spilling over into other specialized areas of the law. *Sedima* had rejected such an effort by the Second Circuit.[168]

Cases like *Reves* have the effect of "RICOizing" federal securities law,[169] while cases like *Sedima* have the effect of "RICOizing" and federalizing state fraud claims in cases in which the use of the mails converts local fraud into mail fraud, which in turn becomes actionable in civil cases only through RICO.[170] Unless the Court was willing to undercut the reasoning in *Sedima*, the Court could not state its concern in *Reves* about using RICO in securities fraud cases, an area in which Congress has already heavily legislated.[171]

Litigation in fraud cases also presents troubling proof problems. For example, in some cases, accountants or lawyers may be charged with mail fraud based on dissemination of misinformation through the mails.[172] But the lawyer, accountant or other professional may have been negligent, rather than willful, in preparing a document. For example, in a number of cases, professionals have been charged with fraud based on touting a tax shelter eventually disallowed by the IRS.[173] But the representation that the tax shelter was sound may have been based on ignorance or bad judgment rather than on

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163 *Id.* at 955.

164 *Id.* at 950.

165 *Id.* at 955.

166 *Id.* at 956 (Mikva, J., concurring).

167 *Id.* at 957 (Mikva, J., concurring).

168 Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481 (1985).

169 *See* Crovitz, *supra* note 6, at 1058–59.

170 *See* Getzendanner, *supra* note 154, at 680–81.

171 *See Sedima*, 473 U.S. at 504–05 (Marshall, J., dissenting).

172 *See, e.g.*, Sassoon v. Altgelt, 777, Inc., 822 F. Supp. 1303 (N.D. Ill. 1993).

173 *See, e.g.*, Nolte v. Pearson, 994 F.2d 1311 (8th Cir. 1993).

an intent to defraud. Negligence or malpractice is not mail fraud because there is no intent to defraud.[174] But the mens rea of mail fraud may not be sufficient protection for those accused of fraudulent conduct because of the way in which a prosecuting party proves fraudulent intent.[175]

In a fraud case, the plaintiff will seldom have a "smoking gun" on the intent to defraud. Few defendants will admit that they acted consciously to deceive the victim of the fraud.[176] Instead, the mental element will be proven inferentially from facts known to the defendant. The fact finder will then be invited to infer what the defendant must have known.[177] Hence, the bungling professional who should have known that an asset was overvalued is hard to distinguish from one who, the jury may believe, had actual knowledge.[178] From the jury's perspective, the difference between fraud and malpractice may not seem particularly significant: in both cases, the victim is equally harmed. Given the limited ability to take a case away from the jury,[179] the trial court

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[174] 18 U.S.C. § 1341 is explicit that a defendant must have an intent to defraud. *See* Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *cf.* Durland v. United States, 161 U.S. 306, 313 (1896) (identifying the significant fact as intent and purpose). *See generally* 2 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY, § 8:51 (2d ed. Clark Boardman Callaghan, 1992).

[175] *See* Blakey et al., *supra* note 4, at 1082.

[176] That would appear obvious in cases reviewed in this discussion. Were the defendant to admit the fraud, plaintiff would almost certainly be able to move for partial summary judgment on the question of liability. *Cf.* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (upholding motion for partial summary judgment proper because issue of defendant's false and misleading proxy statement was collaterally estopped).

[177] *See* United States v. Andrade, 788 F.2d 521, 526 (8th Cir.), *cert. denied*, 479 U.S. 963 (1986); United States v. Fuel, 583 F.2d 978, 983 (8th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979); United States v. Nance, 502 F.2d 615, 618 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); United States v. Seasholtz, 435 F.2d 4, 8 (10th Cir. 1970). Further, a number of cases have allowed either a willful blindness or reckless disregard charge. *See* United States v. Kaplan, 832 F.2d 676, 682 (1st Cir. 1987), *cert. denied*, 485 U.S. 907 (1988); United States v. Dick, 744 F.2d 546, 551 (7th Cir. 1984); United States v. Massa, 740 F.2d 629, 643 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). Willful blindness may allow an inference of actual knowledge. *See* United States v. Jewel, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976); *see also* BRICKEY, *supra* note 174, at § 8:51.

[178] In some cases, federal courts, while purporting to require knowledge, assume that knowledge is satisfied if a defendant should have known a fact, hence, treating the objective negligence standard as the equivalent of the subjective requirement of knowledge. *See, e.g.*, United States v. Johnson & Towers, Inc., 741 F.2d 662, 664–65 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

[179] Because of concerns that use of the directed verdict or judgment notwithstanding

will be able to provide the bungling professional with little protection from a finding that he or she committed fraud. That is, the case would be ripe for neither a summary judgment nor a judgment as a matter of law. RICO's treble damages and attorneys' fees provisions, however, are not appropriate for negligent actors.

A related policy consideration in *Reves* is the apportionment of damages. Typical of our system is that defendants who are jointly and severally liable pay the entire damages if their cohorts are judgment proof.[180] That rule has been targeted by proponents of tort reform because it can produce great injustice.[181] For example, deep-pocket corporate defendants have often complained that they are left holding the bag for conduct in which their fault is minor and a more culpable joint tortfeasor is insolvent.[182] The result is that the solvent defendant pays damages grossly out of proportion with his or her degree of fault. The problem is especially acute in RICO cases because the disproportionality between damages and the defendant's fault is magnified when the damages are trebled.

Had *Reves* reversed the decision of the lower court, a jury may have found the auditors' liable in such a case. The Co-op had been run aground by two men found guilty of tax fraud;[183] the general manager of the Co-op appears to have drained four million dollars from the Co-op.[184] By comparison, the auditors may have bungled, but their fault hardly rises to the level of the general manager's self-dealing. The auditors, however, would be liable for the entire amount of the judgment, absent other solvent defendants.[185]

The Court's assertion in *Reves* that the plain language of § 1962(c) was dispositive meant that the Court did not have to articulate underlying policy considerations. But the language was not plain[186] and despite the Court's confidence that its management or control test was easily applied, *Reves* has

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the verdict may violate the Seventh Amendment right to a jury trial, federal courts must view the evidence in a light most favorable to the nonmoving party. *See, e.g.*, Lavender v. Kurn, 327 U.S. 645 (1946); Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957).

[180] *See* RESTATEMENT (SECOND) OF TORTS § 875 (1979).

[181] *See id.* at § 886B (1979) (An inferential step may support the proposition, but the Restatement does not mention tort reform.).

[182] *See* Jay K. Wright, *Why Are Professionals Worried About RICO?*, 65 NOTRE DAME L. REV. 983, 992–95 (1990).

[183] Reves v. Ernst & Young, 113 S. Ct. 1163, 1167 (1993).

[184] *Id.*

[185] *See, e.g.*, Fleischhauer v. Feltner, 879 F.2d 1290, 1301 (6th Cir. 1989) (holding that the nature of RICO offenses requires joint and severable liability), *cert. denied*, 493 U.S. 1074 (1990); United States v. Wilson, 742 F. Supp. 905, 909 (E.D. Pa. 1989) (holding that joint and severable liability is consistent with RICO).

[186] *See supra* note 14.

proved unworkable. Lower courts are in disarray.[187] The Court's analysis in *Reves* focused on the peculiar facts of the case without explaining whether the Court's holding was limited to cases involving omission liability under the securities laws.

Reves has already generated considerable litigation, especially in cases involving professional defendants[188] whose professional associations have been active in lobbying for legislative reform.[189] Much of the confusion spawned by *Reves* is a result of the Court's failure to confront hard policy questions that were present in the case.

VI. *REVES* IN THE COURTS

For those eager to see RICO narrowed, *Reves* is a welcome change.[190] Indeed, many federal courts have found in *Reves* a broad invitation to limit RICO. But as argued below, many courts have demonstrated more hostility to RICO than fidelity to *Reves*. Two lines of cases are especially troubling: one line of cases has found in *Reves* a general immunity for outsiders who are providers of professional services;[191] the second line has found in *Reves* a requirement that a § 1962(c) defendant must have responsibility for directing another person.[192]

A. *Providers of Professional Services*

In what may become a significant legal trend,[193] a number of courts have

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[187] *See infra* text accompanying notes 194–281.

[188] *See, e.g.*, Azrielli v. Cohen Law Offices, 21 F.3d 512 (2d Cir. 1994); Napoli v. United States, 32 F.3d 31 (2d Cir. 1994); Stone v. Kirk, 8 F.3d 1079 (6th Cir. 1993); Baumer v. Pachl, 8 F.3d 1341 (9th Cir. 1993); University of Maryland v. Peat Marwick Main & Co., 923 F.2d 265 (3d Cir. 1991); Sassoon v. Altgelt, 777, Inc., 822 F. Supp. 1303 (N.D. Ill. 1993); Morin v. Trupin, 832 F. Supp. 93 (S.D.N.Y. 1993); Gilmore v. Berg, 820 F. Supp. 179 (D.N.J. 1993); United States v. Altman, 820 F. Supp. 794 (S.D.N.Y. 1993); *In re* Crazy Eddie Securities Litigation, 824 F. Supp. 320 (E.D.N.Y. 1993).

[189] *See* Wright, *supra* note 182, at 984.

[190] *See supra* text accompanying notes 81–111 (discussing the fact that *Reves* is the first case in which the Supreme Court has affirmed the lower federal court's decision in which it limited RICO).

[191] *See infra* text accompanying notes 193–251.

[192] *See infra* text accompanying notes 252–81.

[193] Ralph A. Pitts et al., *Civil RICO and Professional Liability After* Reves*: Plaintiffs Will Have to Look Elsewhere to Reach the "Deep Pockets" of Outside Professionals (Part 2 of 2)*, CIV. RICO REP., Oct. 20, 1993, at 1.

found in *Reves* support for the proposition that providers of professional services who can otherwise be characterized as outsiders are beyond the scope of § 1962(c). The following cases illustrate this trend.

In *Baumer v. Pachl*, plaintiffs were investors in a California limited partnership.[194] Emery Erdy and his corporation, Estate Planning Associates, Inc. (EPA), the organizers of the partnership, were ordered by the California Department of Corporations to desist public sale of partnership interests because the transactions amounted to the illegal sale of unregistered securities.[195] Plaintiffs did not sue EPA or Erdy because EPA and Erdy, were already in bankruptcy proceedings.[196]

Instead, the investors sued the attorney who provided EPA and Erdy with legal services and they sued a licensed real estate appraiser who appraised the property in which the plaintiffs had invested.[197] The plaintiffs' RICO claim against the attorney was based on his representation of EPA and Erdy before the state agency. Plaintiffs alleged that the attorney attempted to cover up EPA and Erdy's fraud by mischaracterizing their conduct in correspondence with the state. Furthermore, the plaintiffs alleged that the attorney made false representations in correspondences to the limited partners.[198] While the attorney was representing EPA and Erdy in bankruptcy, he allegedly misrepresented to the limited partners the status of EPA and Erdy's assets in an effort to discourage legal actions against them.[199]

The trial court, relying on *H.J. Inc.*, dismissed the claim against the attorney because the court found that the plaintiffs' § 1962(c) claim failed to allege a "pattern of racketeering."[200] The Ninth Circuit affirmed the judgment of the district court but did so in reliance on *Reves*, rather than on *H.J. Inc.*[201]

The Ninth Circuit characterized the complained of conduct in *Reves* as "Ernst & Young's preparation of the audit reports, meetings with the Board of Directors to explain the audits, and presentations at the annual meetings."[202] The court analogized the attorney's conduct to that of Ernst & Young: the attorney held no formal position in the organization, his involvement began several years after the fraudulent scheme began, and his role was sporadic.[203]

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194 8 F.3d 1341, 1342 (9th Cir. 1993).
195 *Id.* at 1342.
196 *Id.* at 1342 n.1.
197 *Id.* at 1343.
198 *Id.* at 1342.
199 *Id.* at 1343.
200 *Id.*
201 *Id.* at 1344.
202 *Id.*
203 *Id.*

The court described the attorney's role as "limited to providing legal services to the limited partnership and EPA."[204] *Reves* held, according to the Ninth Circuit, that whether legal services are rendered "well or poorly, properly or improperly, is irrelevant to the *Reves* test."[205] *Baumer* appears to adopt the general rule that an attorney who is providing legal services does not violate § 1962(c).[206]

In *Sassoon v. Altgelt, 777, Inc.*, the plaintiffs alleged that the defendant law firm "drafted [a limited partnership] Offering which contained the promise that investors['] funds would be returned to them if either of two contingencies were not met."[207] The complaint also alleged additional fraudulent acts sufficient to support a common law fraud claim for misrepresentation.[208] Despite that, the court dismissed the RICO claim because the law firm's "conduct consisted of providing legal services to the general partners and to the limited partnership."[209] According to the district court, a defendant cannot be found liable under § 1962(c) merely for providing legal services.[210]

A final example demonstrates the willingness of courts to use *Reves* to exempt professionals from liability under § 1962(c). In *Biofeedtrac, Inc. v. Kolinor Optical Enterprises & Consultants, S.R.L.*, plaintiff's principal, Dr. Joseph Trachtman, granted defendant George Jordan's company, Kolinor, distribution rights for Biofeedtrac's vision training device.[211]

Biofeedtrac's complaint alleged that multiple defendants, including Kolinor, used plaintiff's trade secrets to attempt to manufacture and market a competing vision device. It further alleged that the defendants concealed the scheme through multiple acts of mail and wire fraud.[212]

Plaintiff named Christopher Kuehn, an attorney who had left a New York law firm to start his own practice with Kolinor as his only client, as a defendant. According to the complaint, Kuehn represented Kolinor in its attempt to manufacture its own optical device and informed Jordan of the legal risks involved in his project. But Plaintiff alleges that Kuehn went beyond giving what one might reasonably characterize as legal advice when he offered to create the appearance during negotiations with Biofeedtrac that Kolinor was eager to distribute the device in order to "mask Jordan's scheme to

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204 *Id.*
205 *Id.*
206 *Id.*
207 822 F. Supp. 1303, 1307 (N.D. Ill. 1993).
208 *Id.*
209 *Id.*
210 *Id.*
211 832 F. Supp. 585, 587 (E.D.N.Y. 1993).
212 *Id.*

manufacture the competing device."[213]

During this time, Jordan provided technicians with Biofeedtrac's device so that they could dismantle it in order to develop their own device. Kuehn was aware of this work and that this device would infringe Biofeedtrac's patents.[214] To facilitate the project, Kuehn incorporated two companies, named himself to the companies' boards, and offered to serve as counsel to the two companies.[215]

Biofeedtrac filed its action in April 1990, naming several defendants, and claiming, inter alia, that the defendants violated § 1962(c). Kolinor was named as the enterprise.[216] According to Biofeedtrac, prior to a hearing in early May for injunctive relief, Kuehn advised a witness to commit perjury.[217] The court summarized Kuehn's involvement as follows: Kuehn knew about the fraudulent scheme to manufacture the vision device; he "advised Jordan how to avoid detection and to minimize the legal risks of such a scheme . . . performed ministerial legal tasks in advancing the project, and advised one participant that he could mislead this court."[218]

The district court dismissed the claim against Kuehn based on its reading of *Reves*. The court characterized the issue of the case as whether RICO imposes liability "on an attorney who provides legal advice and legal services to clients, intending the advice and services to advance the clients' scheme to defraud."[219] The court supported its holding by adopting Justice Souter's characterization of the accountants' role in his *Reves* dissent.[220] Justice Souter argued that the accountants took on a management responsibility by creating the records that they then audited, an act that took them beyond the role of independent accountants.[221] According to the district court, "the Court held, by its silence, that even when professionals go beyond their customary role," they will not be deemed to have participated in the "operation or management of the enterprise itself."[222]

Conceding that Kuehn was "more intimately connected to the operation of the alleged enterprise here than the professionals in *Reves*,"[223] the court found

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213 *Id.* at 588.

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.* at 588–89.

218 *Id.* at 589.

219 *Id.* at 590.

220 *Id.* at 591.

221 Reves v. Ernst & Young, 113 S. Ct. 1163, 1176 (1993) (Souter, J., dissenting).

222 Biofeedtrac, Inc., v. Kolinor Optical Enters. & Consultants, S.R.L., 832 F. Supp. 585, 591 (1993).

223 *Id.*

that his conduct was confined to giving legal advice and providing legal services. By comparison, he did not participate in the decision to manufacture the infringing device or offer business (as opposed to legal) advice.[224] His compensation was limited to fees for legal services. The court dismissed as within the ordinary role of corporate counsel Kuehn's position as the sole director and officer for one of the companies that he incorporated.[225]

The three cases discussed above are factually distinguishable from *Reves* and extend *Reves* to unintended territory. While *Baumer* and *Sassoon* involved allegations that an attorney actively misrepresented client conduct in order to cover up the client's fraudulent scheme, *Biofeedtrac* goes even further. Like the plaintiffs in *Baumer* and *Sassoon*, the plaintiff in *Biofeedtrac* alleged that the attorney actively misrepresented facts.[226] Beyond that, the plaintiff in *Biofeedtrac* alleged that Kuehn acted as a corporate officer, a role often served by corporate counsel, but not necessarily a position reserved for lawyers.[227] Most damning, however, was the fact that Kuehn allegedly suborned perjury or attempted to obstruct justice in his efforts to get a witness to mislead the court.[228]

Unlike *Reves*, in which the accountants' "failure to tell the Co-op's board"[229] was insufficient to create liability, in *Baumer*, *Sassoon*, and *Biofeedtrac* the lawyers engaged in *active* conduct in violation of RICO's predicate offenses. While a professional may not manage, operate, conduct or participate by inaction, no similar problem arises if one takes affirmative actions.[230]

Even if *Reves* is not limited to its facts, cases like *Baumer*, *Sassoon* and *Biofeedtrac* go too far. These cases have created a bright-line rule for outsider-professionals who provide services to the enterprise. *Reves* specifically rejected such an easy distinction between insiders and outsiders. The *Reves* Court recognized that some outsiders may be said to operate or manage the affairs of the enterprise.[231]

Creating an exemption for professionals sets up a questionable double standard. Cases like *Biofeedtrac* give professionals a blanket immunity even

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[224] *Id.*

[225] *Id.*

[226] *Id.* at 587. For example, urging a witness to commit perjury is arguably not even giving legal advice. The relevant statute is 18 U.S.C. § 1622 (1988) (subornation of perjury).

[227] *Biofeedtrac, Inc.*, 832 F. Supp. at 591.

[228] *Id.* at 588–89.

[229] Reves v. Ernst & Young, 113 S. Ct. 1163, 1173–74 (1993).

[230] *See supra* text accompanying notes 147–51.

[231] *Reves*, 113 S. Ct. at 1173.

when their conduct violates provisions of § 1962(c).[232] By contrast, no immunity exists for a Mafioso or a business person who commits the same acts. For example, in *Sassoon*, if a nonlawyer business person sent out the same allegedly fraudulent letters, that person would be liable under § 1962(c) while the lawyer would be exempt even if he or she committed the requisite predicate offenses and engaged in sufficient acts to meet the "pattern" requirement as defined in *H.J. Inc.*[233]

A court might believe a broad exemption for lawyers is justified by a need to allow the attorney to represent his or her client zealously without fear of reprisals for that representation.[234] *Reves* may have been concerned about converting professional misconduct into criminal conduct.[235] But such a policy argument has failed in other contexts. For example, cases have held that an attorney advising his or her client to plead the Fifth Amendment may be guilty of a violation of 18 U.S.C. § 1503 if the prosecutor can prove the requisite corrupt intent.[236] This intent may be established when the attorney advises his or her client not to testify in order to protect a third party, rather than to protect

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[232] In some more recent cases, courts have taken a different approach to the problem. For example, in *Napoli v. United States*, the Second Circuit found that the lawyer-defendants conducted the affairs of the law firm through a pattern of racketeering. 32 F.3d 31, 37 (2d. Cir. 1994). *Napoli* suggests that the result in cases like *Baumer*, *Biofeedtrac*, and *Sassoon* might be avoided by plaintiffs if plaintiffs plead a different enterprise, specifically, the law firm. *See* Tribune Co. v. Purcigliotti, 869 F. Supp. 1076 (S.D.N.Y. 1994) (in which professionals, including members of a law firm, were alleged to have participated in an association-in-fact, consisting of various entities). By implication, *Purcigliotti* suggests that the result in cases like *Baumer* might have been different if the plaintiffs had alleged a different enterprise, an association-in-fact, in which case the lawyers' conduct may have met *Reves*' operation or management test.

[233] H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 236–41 (1989).

[234] In the cases reviewed, defendants other than the providers of professional services remain liable for the same conduct. *See* Morin v. Trupin, 832 F. Supp. 93 (S.D.N.Y. 1993); Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L., 832 F. Supp. 585 (1993).

[235] That rationale may sometimes motivate judicial line drawing. *See, e.g.*, Morgan v. United States, 309 F.2d 234 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 917 (1963) (drawing a distinction between false statements to the court in its administrative as opposed to judicial capacity for purposes of criminal liability under 18 U.S.C. § 1001 to avoid criminalizing trial tactics). *But see* United States v. Cintolo, 818 F.2d 980 (1st Cir.) (rejecting a lawyer's claim for a special defense to a charge under 18 U.S.C. § 1503 (obstructing justice) and finding that evenhanded justice requires that lawyers be held to the same standard of conduct as other defendants), *cert. denied*, 484 U.S. 913 (1987).

[236] *Cintolo*, 818 F.2d at 990. *But see* United States v. Herron, 28 F.2d 122 (N.D. Cal. 1928).

the attorney's client.[237]

A broad exemption for professionals also flies in the face of congressional history. As developed above, the Katzenbach Commission identified the Mafia's modus operandi as including the use of accountants and other professionals to manage their resources and the use of lawyers to help corrupt the judicial system.[238] The Commission recognized that the Mafia could not function alone on muscle and murder, but had become truly dangerous because it had discovered how to gain an appearance of legitimacy by relying on the technical expertise of professionals.[239]

Hence, the court in *Biofeedtrac* missed the point when it stated that the lawyer did not manufacture or decide to manufacture the competing vision device.[240] For example, the Katzenbach Commission described the Mafia as characterized by its structure and division of labor with some soldiers performing intimidation and violence and others finding investments to launder mob money and still other family members bribing politicians and judges.[241] If the allegations in *Biofeedtrac* were true, the lawyer acted as a consiglieri, a role within the Mafia's hierarchical structure, occupied by an individual who enjoys power and influence through the advice he gives other Mafia leaders.[242]

Most of the decisions granting immunity to lawyers have dealt with outside counsel, not corporate counsel.[243] Were corporate counsel to prepare fraudulent documents in furtherance of the enterprise's business, most courts would not exempt that lawyer. Corporate counsel would most likely be held liable because, as the *Reves*' decision suggests, a case against outsiders is more difficult to prove than one against a person within the enterprise.[244] Thus, if the allegedly fraudulent correspondence in *Sassoon* was prepared by corporate counsel, the attorneys who prepared the correspondence would apparently not come within the exemption articulated by the *Reves* court. Likewise if corporate counsel obstructed justice by regularly destroying corporate documents, the fact that the attorneys' conduct may relate to rendering services

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237 *Cintolo*, 818 F.2d at 992–93.

238 *See supra* text accompanying notes 41–46.

239 *See* TASK FORCE REPORT, *supra* note 31, at 4.

240 Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L., 832 F. Supp. 585, 591 (1993).

241 *See* TASK FORCE REPORT, *supra* note 31, at 8.

242 *Id.* at 7.

243 *See, e.g.*, Baumer v. Pachl, 8 F.3d 1341 (9th Cir. 1993); Gilmore v. Berg, 820 F. Supp. 179 (D.N.J. 1993); Morin v. Trupin, 832 F. Supp. 93 (S.D.N.Y. 1993); Sassoon v. Algelt, 822 F. Supp. 1303 (N.D. Ill. 1993); United States v. Altman, 820 F. Supp. 794 (S.D.N.Y. 1993).

244 *See, e.g.*, *Sassoon*, 822 F. Supp. at 1303. *But see Biofeedtrac, Inc.*, 832 F. Supp. at 591 (extending protection to an attorney who served as corporate counsel).

as lawyers would appear to be irrelevant as to whether they violated § 1962(c). Liability would be unquestionable.

A number of differences may exist between corporate counsel and outside counsel relating to, for example, whether the attorney has satisfied the pattern requirement[245] or whether he or she has the requisite mens rea. It is hard to understand, however, why doing the very same act can amount to "conducting the affairs of the enterprise" if done by corporate counsel but not if done by outside counsel. The difference must be found elsewhere.[246]

Reves does not support a broad reading that extends an immunity to providers of professional services.[247] Such an immunity contravenes policy and the legislative history.[248] A question therefore remains as to how the Court might draw a better line when it ultimately returns to the meaning of § 1962(c). Decisions like *Sassoon* and *Baumer* would make sense only if *Reves* turned on a concern, unstated by the Court, that RICO was unfairly applied to deep pocket professionals.[249]

Alternatively, many of the cases reading *Reves* broadly have involved mail fraud and securities fraud, and have allowed RICO its broadest reach. Mail fraud federalizes and then trebles damages caused by common law fraud, which would be actionable only under state law but for RICO.[250] RICO actions based on securities fraud alter the legal landscape worked out by Congress in a highly specialized field of securities law, arguably beyond congressional intent.[251] But if that is the policy underlying *Reves*, one wonders why only outside professionals escape liability while other business people are still subject to liability under RICO.

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245 H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989).

246 *See infra* text accompanying notes 283–368.

247 *See supra* text accompanying notes 138–87.

248 *See supra* text accompanying notes 41–46.

249 *See supra* text accompanying notes 152–87.

250 *See supra* text accompanying notes 158–61.

251 *See supra* text accompanying notes 167–71.

B. *Directing Underlings*

Morin v. Trupin demonstrates the protracted litigation that can arise in a RICO case.[252] *Morin*'s tortuous history may explain the frustration some federal judges feel in dealing with RICO cases.[253]

The *Morin* litigation involved various groups of investors in real estate limited partnerships syndicated by defendant Trupin through interconnected companies and partnerships that made the offers to the plaintiff-investors.[254] The plaintiffs alleged that private placement memoranda were fraudulent in failing to reveal Trupin's involvement.[255] Plaintiffs named as a defendant a New York law firm alleged to have prepared tax opinions used in the memoranda. This law firm also represented Trupin in an audit before the IRS.[256]

The district court granted the law firm's motion to dismiss. The court's analysis was broader than in the professional services cases, though closely related to those decisions. The district court found that "there is no suggestion that the . . . defendants ever directed anyone to do anything."[257] The court recognized that the lawyers may have had "persuasive power to induce management to take certain actions," but that the power to influence is not equivalent to the power to direct; in order to impose liability the *Reves* court required a power to direct.[258]

United States v. Altman demonstrates that at least some lower federal courts are willing to read *Reves* broadly even in criminal cases.[259] The Surrogates Court of New York County appointed the defendant as an executor for an estate, a conservator for a mentally incompetent person, and a receiver for a company. The defendant was accused of having "looted" the estate,

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[252] 823 F. Supp. 201 (S.D.N.Y. 1993).

[253] The proceedings in this case are many. *See* Morin v. Trupin, 778 F. Supp. 711 (S.D.N.Y. 1991), *reh'g granted*, 809 F. Supp. 1081 (S.D.N.Y. 1993), on reargument, 823 F. Supp. 201 (S.D.N.Y. 1993); Morin v. Trupin, 832 F. Supp. 93 (S.D.N.Y. 1993); Morin v. Trupin, 799 F. Supp. 342 (S.D.N.Y. 1992); Morin v. Trupin, 747 F. Supp. 1051 (S.D.N.Y. 1990); Morin v. Trupin, 738 F. Supp. 98 (S.D.N.Y. 1990); Morin v. Trupin, 711 F. Supp. 97 (S.D.N.Y. 1989); Morin v. Trupin, 728 F. Supp. 952 (S.D.N.Y. 1989); *see also* Ahmed v. Trupin, 809 F. Supp. 1100 (S.D.N.Y. 1993); Ahmed v. Trupin, 781 F. Supp. 1017 (S.D.N.Y. 1992).

[254] *Morin*, 823 F. Supp. at 203–04.

[255] *Id.*

[256] *Id.* at 204.

[257] *Morin*, 832 F. Supp. at 98.

[258] *Id.* The court also concluded that providing legal services is not within § 1962(c). *Id.*

[259] 820 F. Supp. 794 (S.D.N.Y. 1993).

conservatorship, and receivership. In a multicount indictment, the government alleged a violation of § 1962(c). The alleged enterprise was the New York Surrogates Court.[260]

The district court dismissed the § 1962(c) count because "there [was] no suggestion that [the defendant] ever 'directed' anyone else to do anything."[261] The conclusion that one must direct another to meet the *Reves* test is apparently grounded in the language in *Reves* to the effect that § 1962(c) does not extend "beyond those who participate in the operation or management of an enterprise."[262]

As with the cases creating an immunity for providers of services, *Morin* and *Altman* are at least factually distinguishable from *Reves*. In an earlier opinion in *Morin*, the court found that the complaint alleged sufficient "primary wrongdoer securities fraud under Rule 10(b)" to withstand a motion to dismiss.[263] The complaint alleged a variety of omissions among the bases of liability.[264] It also alleged a number of affirmative acts committed by the lawyers, including the preparation of "false and/or misleading tax opinions and tax information."[265] The complaint also alleged that in preparing a private placement memorandum, the defendants concealed information from investors.[266]

As indicated above, courts construing *Reves* have typically ignored the underlying securities fraud theory that the plaintiffs in *Reves* relied upon. The underlying theory was that the auditors failed to speak up at the board meeting.[267] The accountants' full audit disclosed how the auditors had valued the gasohol plan.[268] That choice may have been negligent and the auditors'

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[260] *Id.* at 795.

[261] *Id.* at 796.

[262] *Id.* at 795 (citing Reves v. Ernst & Young, 113 S. Ct. 1163, 1172 (1993)). *See* Amalgamated Bank of New York v. Marsh, 823 F. Supp. 209 (S.D.N.Y. 1993). The plaintiff bank employed defendant Marsh for over nine years, during which time he was able to embezzle almost $9 million from the bank. Part of his scheme involved depositing money to the account of Viva Pancho. According to the plaintiff, Viva Pancho's fraud consisted of making "material misrepresentations to [plaintiff] by receiving, accepting and depositing the proceeds of numerous . . . checks . . . with knowledge that the checks were wrongfully procured." *Bank of New York*, 823 F. Supp. at 217. The court dismissed a § 1962(c) claim against Viva Pancho in reliance on *Altman*'s requirement that a § 1962(c) defendant must actually direct someone else. *Id.* at 220.

[263] Morin v. Trupin, 778 F. Supp. 711, 725 (S.D.N.Y. 1991).

[264] *Id.* at 720–21.

[265] *Id.* at 720.

[266] *Id.* at 720–21.

[267] *See supra* notes 193–266 and *infra* notes 268–81.

[268] Reves v. Ernst & Young, 937 F.2d 1310, 1318 (8th Cir. 1991), *aff'd*, 113 S. Ct.

failure to reveal information may have been a breach of their duty, and in violation of the securities law. By comparison, the plaintiffs in *Morin* and *Altman* alleged active fraud, not a failure to reveal when the duty arose, but the fraudulent misrepresentations in the private placement memorandum.[269]

The *Morin* and *Altman* courts improperly extended *Reves* to claims of affirmative misrepresentation. The *Reves* Court did not impose a requirement that an outsider, otherwise associated with the enterprise, must direct or have responsibility to direct others to meet the requirements of § 1962(c). The *Reves* Court stated that "'conduct' . . . indicates some degree of direction."[270] The *Reves* Court also stated that "'participate' [means]—'to take part in.'"[271] Understood together, the terms mean that "RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required."[272] The Court stated that the "'operation or management' test expresses this requirement in a formulation that is easy to apply."[273] The Court also noted that it did not have to decide "how far section 1962(c) extends down the ladder of operation because it is clear that Arthur Young was not acting under the direction of the Co-op's officers or board."[274] It may be implied that one might be a § 1962(c) defendant if one takes rather than gives directions, at least insofar as the employer is implementing managerial decisions.

The Court said that one need not direct another to meet the *Reves*' test. The *Reves*' test is satisfied not only if one manages the enterprise but also if one operates the enterprise. "Management" may imply that one has responsibility for directing others. "Operation" does not have a similar meaning; quite the contrary, "operate" as in "operative" may imply that one is a line worker, not a manager.[275]

Further support is found in *Reves*, where the court held that an outsider who committed bribery may meet its test: "An enterprise also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert

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1163, 1174 (1993).

[269] Morin v. Trupin, 778 F. Supp. 711, 720–21 (S.D.N.Y. 1991); United States v. Altman, 820 F.Supp. 794, 795 (S.D.N.Y. 1993).

[270] *Reves*, 113 S. Ct. at 1169.

[271] *Id.* at 1170.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 1174

[275] "Operative" is defined as a "skilled workman; . . . an artisan; . . . a mechanic." "Operation" is defined as the condition of being in action or at work. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1253 (2d ed. 1983). *Reves* specifically rejected a requirement that a § 1962(c) defendant must have significant control or be in the upper management of an enterprise. *Reves*, 113 S. Ct. at 1170.

control over it as, for example, by bribery."[276] If the Court means to suggest that any person offering a bribe operates or manages the affairs of the enterprise, cases like *Altman* and *Morin* are wrong. One who commits bribery does not necessarily direct another person. In many bribery situations, the official who is bribed is doing the directing.[277] Even if the briber is not the party demanding the bribee to perform his or her job, the briber is guilty of bribery even if the bribee does not change his or her job performance as a result of accepting the bribe.[278] This suggests an element of freedom on the part of the bribee, in that the briber is guilty of bribery even if the briber has been entirely ineffective and unable to direct anyone. It is more accurate to speak of the briber as attempting to influence rather than attempting to direct in many bribery cases.[279]

By comparison, a lawyer in a case like *Morin* probably has as much influence over a client as a briber has over an official.[280] Likewise, the defendant in *Altman* manipulated the surrogate court in its job, just as a briber expects to manipulate the bribee by paying a bribe.[281]

VII. PROPOSED ANALYSIS

Reves left more questions unanswered than resolved.[282] As argued above,

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[276] *Reves*, 113 S. Ct. at 1173.

[277] *See, e.g.*, Dixson v. United States, 465 U.S. 482, 485 (1983); United States v. Arroyo, 581 F.2d 649, 651 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

[278] United States v. Anderson, 509 F.2d 312, 332 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

[279] *See, e.g.*, United States v. Woods, 915 F.2d 854, 862–63 (3d Cir.), *cert. denied*, 499 U.S. 947 (1993); United States v. Dischner, 974 F.2d 1502, 1507 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993); United States v. Friedman, 854 F.2d 535, 558–59 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

[280] *See* Jeffrey N. Shapiro, Comment, *Attorney Liability Under RICO § 1962(c) After* Reves v. Ernst & Young, 61 U. CHI. L. REV. 1153, 1174 (1994).

[281] United States v. Altman, 820 F. Supp. 794, 795 (S.D.N.Y. 1993). In fact, the defendant in *Altman* is more likely to succeed in his criminal scheme than is the briber. The briber can succeed only if he is dealing with a corrupt official while the lawyer in *Altman* could succeed in his criminal scheme as long as no one discovered the misrepresentations in the papers filed with the court.

[282] *Reves* has produced considerable confusion among commentators as well as among courts. For example, two authors believe that *Reves* represents a significant impairment on a prosecutor's ability to bring charges against Mafia foot soldiers because "[t]he soldier in an organized crime family does not control or manage the affairs of the godfather's enterprise—the godfather does. The soldier follows orders." Ira H. Raphaelson & Michelle D. Bernard, *RICO and the "Operation or Management" Test: The Potential Chilling Effect*

the Court did not address how other courts should resolve the liability of professionals who take affirmative steps to assist the enterprise.[283] The Court did not resolve how far down the organizational ladder its holding should be applied.[284] In dicta, the Court suggested that an outsider bribing an insider could be characterized as conducting the affairs of the enterprise.[285] Despite the Court's view that its test is clear,[286] the *Reves*' test may be satisfied if a person has a role in the operation, not just the management, of an enterprise.[287] Operation is a potentially expansive concept.

Post-*Reves* cases have focused on the requirement that a defendant must manage the affairs of the enterprise. These cases have ignored the more flexible

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on Criminal Prosecutions, 28 U. RICH. L. REV. 669, 699 (1994). This interpretation is supported by *Reves*, but ignores other aspects of the *Reves* analysis.

Co-authors G. Robert Blakey and Marc Haefner have argued that liability may attach even in cases like *Reves* if a plaintiff relies on principles of conspiracy and aiding and abetting. *See* Blakey & Haefner, *supra* note 26, at 1, 3–4. But they also proposed a surprisingly begrudging interpretation of *Reves* in various business settings when the enterprise alleged is not an associationin-fact. For example, they proposed that courts should rely on precedent interpreting the National Labor Relations Act to define *Reves*' operation or management test. They urged that the question ought to be whether a person exercised "a great deal of control" over a fraudulent scheme. *Id.* at 6. Apart from the obvious problem of line drawing, the proposed analysis seems to reintroduce the test adopted by the District of Columbia Circuit, limiting § 1962(c) to those in "upper management," a test explicitly rejected in Reves v. Ernst & Young, 113 S. Ct. 1163, 1173 (1993). Reliance on analogies from labor law also would appear especially inappropriate in the RICO setting. Given Congress' long support for union democracy, policy underlying federal labor laws would militate in favor of drawing a line nearer to upper management with management as opposed to operational responsibilities. RICO is a different creature than labor law. For example, the monolithic Mafia, RICO's original target, is hierarchical and dictatorial, doing its business through loyal underlings.

A thoughtful student comment correctly argued that lower federal courts have misapplied *Reves*. *See* Shapiro, *supra* note 280, at 1169. The comment argues for a three factor test to be analyzed to determine if the "legal services are so intimately related to the operation or management of an enterprise" to satisfy the *Reves* test: *Reves* would be satisfied first, if counsel usurps management responsibility; second, if counsel initiates the legal services; third, if counsel exercised persuasive power over the client. *Id.* at 1170–73. While those would appear to be sufficient to satisfy *Reves*, this Article has argued that *Reves* was narrower than that and may be satisfied on some lesser showing than the one proposed in the student comment. *See supra* notes 193–281.

283 *See supra* notes 147–87.

284 *Reves*, 113 S. Ct. at 1173 n.9.

285 *Id.* at 1173.

286 *Id.* at 1170.

287 *Id.*

term "operation" in the *Reves* test. That the underlying offenses in *Reves* were based on a failure to act has also been ignored in the post-*Reves* cases. In doing so, the lower federal courts may have effectuated some of the policies unstated in *Reves*. Post-*Reves* developments, however, are troubling. One can only guess what policies the Court may have intended to advance and so one cannot determine whether those policies are well served by the current rules developed by the lower federal courts.[288]

Most of the post-*Reves* decisions involve civil litigation.[289] There, it may be tempting to limit RICO's breadth. But interpretations of RICO are fully applicable in civil and criminal RICO proceedings.[290] Hence, a begrudging rule in civil RICO cases, articulated out of concern, for example, about rules of joint and several liability, may come back to haunt a court in a criminal RICO prosecution. Given that RICO was intended primarily as a criminal statute with civil liability as an afterthought,[291] narrowing RICO to meet the problems faced in civil RICO cases may be allowing the civil tail to wag the criminal dog.

The two lines of cases discussed above[292] and the scholarly efforts to limit the management test to traditional business managers[293] are contrary to RICO's legislative history. Senators McClellan and Hruska, and ultimately Congress, were heavily influenced by the Katzenbach Commission's report.[294] The Commission identified the structure of the Mafia. The Mafia was defined by its hierarchy, starting with the Commission overarching twenty-four Mafia families.[295] The families were organized along identifiable lines of authority,

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[288] *See supra* notes 152–87.

[289] As of February 1995, 354 cases have cited Reves v. Ernst & Young, 113 S. Ct. 1163 (1993), of which 82 were criminal and 272 were civil. Search of LEXIS, Shepards (Feb. 4, 1995).

[290] Critics claim that RICO encourages frivolous lawsuits because it offers a private plaintiff the advantages of a federal forum and the prospect of treble damages and attorneys' fees. *See* Crovitz, *supra* note 6, at 65 (stating that RICO offers the lure of treble damages plus lawyers fees to plaintiffs who bring private actions for damages against private defendants). *See also* Tarlow, *supra* note 3, at 169. One commentator has argued that RICO ought to be interpreted differently depending on whether it is the basis of a civil or criminal action. *See* Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in* Reves, 51 WASH. & LEE L. REV. 61, 82 (1994).

[291] *See* Lynch, *supra* note 2, at 707.

[292] *See supra* notes 193–281.

[293] *See* Blakey & Haefner, *supra* note 26, at 1; *see also*, Pitts et al., *supra* note 193, at 1.

[294] *See* Lynch, *supra* note 2, at 673–80.

[295] *See* TASK FORCE REPORT, *supra* note 31, at 7–10; Cressey, *supra* note 39, at 31–36.

with Il Capo or the Boss at its head, aided by his Underboss or Sottocapo and the Counselor or Consiglieri. Below these authorities were underbosses, lieutenants or Capodecina, section chiefs and soldiers.[296] The Katzenbach Commission identified the Mafia's code of conduct for its members which consisted of rules to govern its membership.[297] The Commission further described the ritual by which one became a "made man" or member of the Mafia.[298] Subsequently, Congress had in mind a distinct organization with an identifiable structure. Congress identified a social evil—the amassing of capital and interference with free competition—that was accomplished by deliberate, concerted activity by members of a hierarchical organization.[299]

A prosecutor must be able to criminalize lower echelon members of the Mafia because the failure to do so leaves junior operatives ready to take over management positions in the organization. Hence, § 1962(c) is not limited to those who manage the affairs of the enterprise; it includes those who operate its affairs through racketeering activity as well.

Reliance on the analogy to the Mafia demonstrates that Congress intended to criminalize soldiers or lower echelon employees or associates. This Article has argued that courts have read *Reves* too broadly by ignoring the fact that the auditors' predicate offenses were based on omissions and by ignoring the "operation" part of the *Reves*' test.[300] Misreading *Reves* has lead some commentators to suggest that § 1962(c) may no longer apply to Mafia foot soldiers.[301]

The Court created much of the confusion with inconsistent statements in *Reves*.[302] It also left unexplored the meaning of "operation," thereby leaving itself latitude in future RICO cases. This Article does not attempt to give a single definition of "operation." Instead, what follows are several recurring situations in which "operation or management" must be given meaningful content and a proposed analysis relying on both the language of § 1962(c) and its legislative history.

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[296] *See id.*

[297] *See* TASK FORCE REPORT, *supra* note 31, at 10; Cressey, *supra* note 39, at 47–50.

[298] *See* TASK FORCE REPORT, *supra* note 31, at 6–10; Cressey, *supra* note 39, at 54–56.

[299] *See* Lynch, *supra* note 2, at 667 (discussing Congress' attempts to define organized crime); *see also* TASK FORCE REPORT, *supra* note 31, at 1–2.

[300] *See supra* notes 193–281.

[301] *See* Raphaelson & Bernard, *supra* note 282, at 699.

[302] *See infra* notes 310–22.

A. *Down The Ladder*

Courts have often cited the example of an employee of a large automaker during working hours, who regularly extorts money from his fellow workers.[303] He is obviously employed by the corporation and is engaging in a pattern of racketeering. One easy answer for why he is not guilty under § 1962(c) is that the corporation is not engaged in the business of extortion. But that depends. If corporate management directed lower echelon employees to extort money, the analysis of the example might change. An example involving more realistic corporate behavior may make the point more clearly: the same hypothetical employee may engage in a number of acts of bribery during the work day. Bribery may be done to advance corporate interests;[304] for example, an environmental protection agency inspector may be bribed to overlook a violation of federal or local environmental laws. If those acts of bribery are at the direction of upper management or are done to advance his employer's business, § 1962(c) would appear to be satisfied.

In the previous example, the defendant was associated with or employed by the corporation; he engaged in a pattern of racketeering; the affairs of the enterprise, e.g., selling automobiles, were advanced by the acts of bribery. The difference between this example and the initial example of the employee merely extorting money from fellow employees, is best understood in terms of mens rea. Like the "made man,"[305] the second hypothetical defendant has engaged in criminal activity to advance the interests of the enterprise.

That a person who acts with the purpose of advancing the interests of the enterprise is guilty under § 1962(c) would appear noncontroversial.[306] What complicates the issue even if the actor's conduct benefits the organization is *Reves* itself. In *Reves*, the accountants may have remained silent at the Co-op board meeting in order to prevent revelation about the enterprise's insolvency.[307] Thus, the Court may have implicitly found that acting for the

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[303] United States v. Dennis, 625 F.2d 782, 790 (8th Cir. 1980) (referring to an employee of General Motors who collected unlawful debts on factory premises). *See* United States v. Cauble, 706 F.2d 1322, 1332 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

[304] *See, e.g.*, United States v. Dischner, 974 F.2d 1502 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993).

[305] *See* TASK FORCE REPORT, *supra* note 31, at 6–10; Cressey, *supra* note 39, at 54–56; MAAS, *supra* note 33, at 38–39.

[306] United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). Even though one may violate § 1962(c) without an intent to benefit the enterprise, such a desire would appear to be sufficient to meet the "participate in the conduct" language of § 1962(c).

[307] Reves v. Ernst & Young, 113 S. Ct. 1163, 1167–68 (1993).

benefit of the enterprise is insufficient without more to violate § 1962(c). Further, *Reves* stated that a § 1962(c) defendant must have "*some* part in directing the enterprise's affairs."[308] Hence, if an employee bribes an EPA official at the direction of his superior, one might argue that the employee has been directed, but has no part in directing the enterprise's affairs.

Again, *Reves*' unusual facts call for a narrow interpretation of its holding. While the Court stated that one must have "*some* part in directing" the affairs of the enterprise, it also stated that an enterprise's affairs are also within its operation and management test when "lower-rung participants . . . are under the direction of upper management."[309] The Court's actual holding involved a situation in which the Court found specifically that the accountants' "failure to tell the Co-op's board" additional information did not meet its test.[310] The plaintiffs in *Reves* did not rely on a claim that the accountants actively misrepresented the financial status of their client in order to conceal its insolvency. This Article has argued that the Court simply did not address that issue and that, should the Court do so, active fraud would come within § 1962(c)'s "conduct" or "participate in the conduct" language.[311]

An individual acting to benefit the enterprise and also meeting the pattern requirement should fall within § 1962(c) whether he or she is formally employed by an enterprise or only "associated" with the enterprise. Here, a mens rea requirement, the purpose of benefiting the enterprise, also serves to establish the association with the enterprise. "Associated" is defined as "united in company or in interest; joined; accompanying."[312] An "association" is, among other things, a "union," "a society formed for transacting or carrying on some business or pursuit for mutual advantage"; as a verb, "associate" means "to unite as friends, partners, etc.; join for a common purpose."[313] Rephrased, § 1962(c) would appear to be satisfied when a defendant, united in interest with the enterprise, for example, by a desire to advance the interests of the enterprise, engages in a pattern of racketeering.[314]

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[308] *Id.* at 1170.

[309] *Id.* at 1173.

[310] *Id.* at 1174.

[311] *See supra* notes 226–51, 268–81.

[312] WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 113 (2d ed. 1983).

[313] *Id.* For a careful analysis of the mens rea requirement in § 1962(c) see United States v. Castellano, 610 F. Supp. 1359, 1395–96 (S.D.N.Y. 1985).

[314] Whether RICO contains a mens rea requirement has divided lower federal courts. Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 383 (1983). For example, some lower federal courts have held that the only mens rea required for a § 1962(c) violation is the proof of the mens rea required by the predicate offenses while other courts have required some additional knowledge or voluntary association with the enterprise. *Id.* at n.384 and the cases cited therein.

One might argue that the accountants in *Reves* were united in interest with the enterprise and were motivated by a desire to further the affairs of the enterprise by their acts of securities fraud, thereby rebutting the suggestion that the problem ought to be resolved by reference to a mens rea requirement. Again, though, the Court found that "it is clear that Arthur Young was not acting under the direction of the Co-op's officers or board."[315] A different case would be presented if the accountants and the Co-op members agreed to misrepresent the Co-op's financial condition.

B. *Insiders, Outsiders and Mens Rea*

The mens rea analysis would prove especially helpful in cases involving "outsiders." As discussed above, some courts have found, relying on *Reves*, that outsiders providing professional services to an organization are exempt from liability under § 1962(c).[316] Even the *Reves* Court recognized that, had the accountants prepared fraudulent documents at the direction of the Co-op representatives, the Court would have been faced with a different case.[317] A mens rea requirement (e.g., that the defendant act with an intent to advance the

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Section 1962(c) does not use a traditional mens rea term, but even if one is not implied in the terms "associate," "conduct," and "participate," a court might imply a term under the analysis dictated by the Court. Morissette v. United States, 342 U.S. 246, 250 (1952). *Morissette* established two presumptions in cases in which the intent of Congress could not otherwise be determined. *Morissette* focused on whether a crime was one at common law, in which case a mens rea term would almost certainly be read into a statute otherwise silent on a scienter requirement while no mens rea would be read into a public welfare statute. *Id.* at 246, 255, 261, n.21. The problem in RICO is that some of the underlying predicate offenses are *mala in se* crimes like murder and robbery while others, like receiving unlawful union payments under the Taft Hartley Act, are modern regulatory crimes. Even though not dispositive, the long sentences available for RICO violations, see 18 U.S.C. § 1963 (1982 & Supp. II 1984) (penalty provisions), would militate in favor of a finding of mens rea. Further complicating the *Morissette* analysis is the Court's decision in United States v. United States Gypsum Co., 333 U.S. 364, 399–402 (1948). There the Court found that a mens rea element should be read into the Sherman Antitrust law. *Id.* It did so in part because of concern that a contrary result might over-deter socially desirable business conduct because a person, operating near the gray area of socially acceptable conduct, would not know when his or her behavior became criminal. *Id.* By contrast, people engaged in continuous criminal acts, as envisioned by Congress when it enacted RICO, would not be engaged in the arguably gray area between socially acceptable and unacceptable conduct. Killing rival gang members and extorting money from noncompliant businesses—the modus operandi of the Mafia—is not close to the line.

315 Reves v. Ernst & Young, 113 S. Ct. 1163, 1173 n.9 (1993).

316 *See supra* notes 193–251.

317 *Reves*, 113 S. Ct. at 1173 n.9.

interests of the enterprise) in conjunction with the pattern requirement makes an outsider look like an insider. The requirement of continuity found in "pattern" means that the defendant has associated with the enterprise over a period of time;[318] mens rea demonstrates that the defendant shares the goals of the enterprise and thus certainly advances the affairs of the enterprise. Focusing on mens rea avoids artificial line drawing between outsiders who may be liable and "complete outsiders."[319]

Acting to benefit the enterprise through continuous criminal activity would appear to be sufficient to meet the requirements of § 1962(c). A difficult question is whether this ought to be a necessary condition of liability. Courts have recognized that a defendant may be able to commit certain crimes because he holds a key position within an organization.[320] A union leader, for example, may be able to extract a tribute from a shipper who requires the services of union members under the unionist's control; the leader does not intend to benefit the union, but instead intends only to line his own pockets.[321]

Prior to *Reves*, the Second Circuit gave the broadest interpretation to § 1962(c)'s requirement of "participation in the conduct" of the affairs of the enterprise. It required either that a person is "enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise" or that "the predicate offenses are related to the activities of that enterprise."[322] While *Reves* implicitly rejected that approach,[323] the unionist example would presumably come within *Reves*' management test simply by virtue of the person's management position within the union.

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[318] H.J. Inc., v. Northwestern Bell Tel. Co., 492 U.S. 229, 242–43 (1989).

[319] *Reves*, 113 S. Ct. at 1173.

[320] *See* United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); United States v. Cauble, 706 F.2d 1322, 1332–33 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

[321] *Scotto*, 641 F.2d at 54. *See* United States v. Provenzano, 688 F.2d 194, 199 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982).

[322] *Scotto*, 641 F.2d at 54.

[323] In *Reves*, the Court explained its grant of certiorari by reference to the conflict among lower federal courts. *Reves*, 113 S. Ct. at 1169. For cases which represent the conflict, see Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991); Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 970 (11th Cir. 1986). The Court adopted *Bennett*. Courts that have considered the question have found implicit in *Reves* a rejection of *Scotto*'s test, presumably on the assumption that *Bennett* was more restrictive than the Second Circuit's test. *See, e.g.*, Amalgamated Bank of N.Y. v. Marsh, 823 F. Supp. 209, 220 (S.D.N.Y. 1993).

If rank and file members of the union engaged in a pattern of racketeering, their liability under § 1962(c) might turn, as argued above, on their mens rea and on whether they were acting under the direction of union officials.[324] Where they were acting on their own behalf, under the Second Circuit approach, the issue would be whether their predicate offenses related to the activities of the enterprise.[325] Under *Reves*, the issue is whether their conduct amounted to operating the enterprise.[326] *Reves* did little to explain the meaning of "operate," leaving itself ample latitude in defining the sweep of § 1962(c).[327]

The appropriate analysis is found in yet another court's interpretation of § 1962(c), that of the Fifth Circuit in *United States v. Cauble*.[328] *Cauble*, in effect, cojoined *Scotto*'s disjunctive requirements. Thus, an actor conducts the activities of the enterprise when he is able to commit the offense by virtue of his position and the offenses related to the activities of the enterprise.[329] For example, an employee who works for a governor and has responsibility for reviewing grants of clemency and misrepresents that the governor will grant clemency, if bribed, would be within the provisions of § 1962(c). The test has the benefit of limiting application of § 1962(c) in cases in which a mail clerk in an enterprise committed a pattern of racketeering only remotely related to the enterprises' business activity.[330] If, for example, a mail clerk in a governor's office misrepresented himself as having the power to review clemency petitions, he would not appear to meet the conjunctive test.

Cases would fall into two general categories: (1) a defendant would come within § 1962(c), whether an insider or outsider, if he or she had the requisite mens rea to benefit the enterprise by committing the predicate offenses;[331] or (2) a defendant would be liable under § 1962(c) even if he or she acted contrary to the interests of the enterprise, the affairs of which he or she conducted, if he or she was able to commit the offenses because of his or her position in the enterprise and the predicate offenses were related to the activities of the enterprise.[332]

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[324] *See supra* notes 303–15.

[325] *Scotto*, 641 F.2d at 54.

[326] *Reves*, 113 S. Ct. at 1173.

[327] *See supra* notes 129–36, 275–81.

[328] 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). Despite the fact that *Cauble* predates *Reves*, this Article contends that adoption of its approach is not foreclosed by *Reves* because the Court has yet to determine RICO's mens rea requirement.

[329] *Id.* at 1332.

[330] *Id.* at 1332 n.22.

[331] *See supra* notes 303–19.

[332] *See supra* notes 320–30.

C. *Bribers After* Reves

Even though the proposed analysis would extend § 1962(c) liability beyond that found in some of the post-*Reves* cases, it would also limit § 1962(c) in some recurring cases. One example is found in *United States v. Yonan* in which the defendant Yonan, a defense attorney, repeatedly bribed a member of the state's attorney's office in exchange for favorable treatment for his clients.[333]

The Seventh Circuit held that Yonan was properly charged under § 1962(c), rejecting Yonan's argument that he was not employed by or associated with the enterprise because he acted to "*undermine* the office and thus had no interest in its goals."[334] The court found no express statutory requirement that a person have a stake or interest in the goals of the enterprise. The court concluded that by giving a "common sense" reading of "association," a person "can associate with the enterprise by conducting business with it."[335]

A common sense reading of association is questionable. For example, an association is defined as a "partnership[,] . . . union or connection of ideas."[336] Yonan may have had a union, partnership or conspiracy with a corrupt state's attorney, but he did not have a connection of ideas with the state's attorney's office.

Despite the Court's dicta in *Reves*, suggesting that its test may be met in bribery cases,[337] it is hard to understand how a defendant like Yonan managed or operated the state's attorney's office. He had no management position. At most, one might argue that he "operated" the enterprise by influencing a decision maker in that organization—a far cry from having a part in directing the affairs of the enterprise. If "operate" means only to have some effect on the enterprise, the Second Circuit's test in *Scotto*, presumably rejected by *Reves*, would be resuscitated.[338] Furthermore, if that were the standard, the accountants' inaction had some effect on the affairs of the Co-op. Had the accountants spoken at the first board meeting, the Co-op would have had a run on its demand notes, forcing it into bankruptcy as much as a year earlier.[339] Thus, if to "operate" means only "to have an effect on," the accountants would have been liable under § 1962(c).

Reves does little to explicate the meaning of "operate," other than by

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[333] 800 F.2d 164, 167–68 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987).

[334] *Id.* at 167.

[335] *Id.*

[336] WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 113 (2d ed. 1983).

[337] Reves v. Ernst & Young, 113 S. Ct. 1163, 1173 (1993).

[338] *See supra* note 323.

[339] *Reves*, 113 S. Ct. at 1168.

implication. The accountants, whose silence had an effect on the enterprise, did not "operate" the enterprise. *Reves* attempted to limit § 1962(c)'s broad sweep. *Cauble*'s twin requirements impose a meaningful limitation on § 1962(c) and would force the Court to reexamine its casual dicta that one engaging in bribery may conduct the affairs of the enterprise.[340] Under *Cauble*, a briber's conduct was related to the activity of the enterprise, but the briber was not able to commit the acts of bribery by virtue of his position in the enterprise.

This comports with the discussion of bribery in the Katzenbach Commission's report. The report identified the Mafia's use of bribery to corrupt the system by gaining control over politicians, judges, and police.[341] But in that context, a Mafioso conducted the affairs of the Mafia, not the judge's or politician's office, through a pattern of racketeering.[342]

By analogy, Yonan may have operated his own law practice through a pattern of racketeering. That places no strain on the language of § 1962(c). One might question, given that the briber may be guilty under § 1962(c) as long as the right enterprise is pled, that the difference is form over substance. But there are meaningful differences between being charged with operating one enterprise or another.

That difference can be illustrated by reference to *United States v. Manzella*.[343] In *Manzella*, "Junior" Provenzano was the "kingpin of a Louisiana crime organization."[344] His organization consisted of several men who regularly engaged in criminal acts, including arson for hire, extortion, and mail fraud.[345] Provenzano was indicted, but most of his regular cohorts were not.[346] Instead, his codefendants included a number of people who purchased Provenzano's organization's services. For example, one defendant, "suffer[ing] many marital difficulties, resolved to end his problems by destroying the property of his estranged wives."[347] Provenzano's group agreed to commit two

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[340] United States v. Cauble, 706 F.2d 1322, 1332 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

[341] *See* TASK FORCE REPORT, *supra* note 31, at 6; Cressey, *supra* note 39, at 25.

[342] There has been an active debate whether RICO is limited to organized crime. Blakey & Perry, *supra* note 92, at 862. But no one doubts that RICO was designed to outlaw the Mafia; that was the classic "enterprise" within the meaning of RICO. And as indicated, one way in which the Mafia conducted its affairs was through a pattern of bribery. *See* TASK FORCE REPORT, *supra* note 31, at 6.

[343] 782 F.2d 533 (5th Cir. 1986), *cert. denied*, 476 U.S. 1123 (1986).

[344] *Id.* at 536.

[345] *Id.*

[346] Provenzano's regular cohorts were not tried as codefendants. According to the court, most of them had cooperated with the government and appeared as prosecution witnesses. *Id.* at 544.

[347] *Id.* at 536.

acts of arson.[348] Another codefendant had the group burn down a building so that he could defraud his insurance company,[349] while yet another codefendant had Provenzano's men "steal" his car, also to collect insurance proceeds.[350]

Provenzano's "customers" were charged with violating § 1962(c); the enterprise alleged was the Provenzano organization.[351] As a result, each customer was forced to go to trial with the other customers in a long and complex proceeding.[352] Group trials have obvious disadvantages and potential for prejudice, including the risk of guilt by association and jury confusion.[353] The defendant's ability to defend effectively is limited by the significant legal fees associated with a trial that may last weeks or months.[354] The alternative would be to charge each individual customer with operating the affairs of a different enterprise, one consisting of the individual defendant and the Provenzano group, an association-in-fact.[355] In that case, there would be no basis upon which the government could join all of the customers in a single case.

The prosecutor gained legal advantage in a case like *Manzella* by the prosecutor's ability to charge the individuals with operating the affairs of Provenzano's enterprise. For example, that enterprise had a distinct existence

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[348] *Id.*

[349] *Id.*

[350] *Id.* In this last instance, the court recognized that the defendant did not engage in a pattern of racketeering activity insofar as he agreed to the commission of only one predicate offense. In the case of the other codefendants, the case was resolved before H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1985). Under *H.J. Inc.*, it might be argued that the defendants did not engage in a pattern of racketeering because, on the specific facts of the case, the criminal conduct was not sufficiently continuous. *H.J. Inc.*, 492 U.S. at 250.

[351] *Manzella*, 782 F.2d at 536.

[352] RICO trials can be exceedingly long. Tarlow, *supra* note 3, at 169. RICO's complexity is suggested by the copious scholarly interest and the large number of issues that have divided lower federal courts. *Id.* In *Manzella*, for example, the court made references to some of the difficult and unresolved questions arising under RICO's complex provisions. *Manzella*, 782 F.2d at 537–38 n.2 (discussing the "fascinating conundrum" raised by charging a § 1962(d) conspiracy while relying on predicate offenses involving acts of conspiracy).

[353] *See, e.g.*, Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978).

[354] In RICO prosecutions, this problem may be compounded by having assets frozen because they may be subject to forfeiture. *See* United States v. Monsanto, 491 U.S. 600, 602–06 (1989); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 619–22 (1989).

[355] *Manzella*, 782 F.2d at 538.

from the pattern of racketeering activity.[356] Were the government instead to charge each individual defendant with operating a separate enterprise, an association-in-fact along with the members of the Provenzano group, there would appear to be no separate proof of the enterprise and the pattern of racketeering. Subsequently, the evidence would probably be insufficient because the Court has suggested that in cases involving an association-in-fact, there must be some proof of an enterprise beyond commission of the predicate offenses.[357] Charging each enterprise separately might also demonstrate a lack of continuity to constitute a pattern of racketeering.[358]

D. *Customers and* Reves

Manzella is also illustrative of another group of cases in which the analysis proposed in this Article might produce a result different from current case law. In *Manzella*, the Fifth Circuit rejected the argument that a customer in an enterprise may not be charged under § 1962(c).[359] The Court observed that a customer may engage in a pattern of racketeering and "[o]nce this is established, his status as a customer becomes irrelevant because Congress intended the prosecution of anyone whose actions fall afoul of § 1962(c)."[360] The Court glossed over the question of whether a customer's actions run afoul of § 1962(c). They do run afoul of § 1962(c) but only if § 1962(c) is satisfied by the commission of two predicate offenses. It is widely recognized that, this alone, is insufficient.[361]

Applying *Reves* to the "customer" argument demonstrates some of the uncertainty of its test. A customer may or may not have a role in "directing" the conduct of the affairs of the enterprise. The purchase of arson services has an effect or influences the activity of the enterprise. Whether that is sufficient to meet the *Reves* test is doubtful.[362]

Under this proposed analysis, the customer lacks the mens rea to advance

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[356] An association-in-fact, composed of individuals whose only relationship was the commission of the relevant predicate offenses, might not be liable under RICO. That is due to the suggestion in *Turkette* that the enterprise and the pattern of racketeering were separate elements and that something in addition to the pattern of racketeering was necessary to demonstrate the existence of the enterprise. United States v. Turkette, 452 U.S. 576, 576, 583 (1981).

[357] *Id.* at 583.

[358] H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 232 (1989).

[359] *Manzella*, 782 F.2d at 538.

[360] *Id.*

[361] *Turkette*, 452 U.S. at 583. *See* Tarlow, *supra* note 314, at 346–47.

[362] *See supra* notes 337–42.

the interests of the enterprise.[363] Hence, the question would be the extent to which the customer is enabled to commit the predicate offenses by virtue of his or her position in the enterprise. Concededly, the second part of the test would be met if the predicate offenses relate to the activities of the enterprise. The "customer" in a case like *Manzella* has no position in the enterprise. He or she may have importance for the enterprise; but by analogy to customers of any commercial venture, it would not be said of Sears' customers that they have a position in Sears.

That conclusion is supported by an understanding of the workings of the Mafia. The Mafia notoriously sells "protection" to various people.[364] In the construction trade, it may sell labor peace,[365] or it may provide a customer an alternative to lengthy contract litigation.[366] For example, a subcontractor on a construction project may have difficulty collecting fees from the contractor. The Mafia often provides the contractor with incentive to pay off the subcontractor. There is no indication that Congress would sweep those parties into a prosecution along with members of the Mafia.[367]

Efforts to limit RICO to organized crime cases have been unsuccessful,[368] rightly so given that Congress specifically recognized that RICO would not apply exclusively to organized crime.[369] But Congress' preoccupation with the Mafia offers relevant legislative history; organizations or individuals whose conduct has no resemblance to the Mafia seem doubtful targets for its draconian remedies. The virtue of the analysis proposed in this Article is its effort to pose some rational boundaries for § 1962(c), resembling classic Mafia activity.

VIII. CONCLUSION

Reves held that the accountants' failure to reveal information, a violation of a duty under the securities law, did not amount to a violation of § 1962(c).[370] The reaction of some commentators[371] and lower federal courts[372]

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363 *See supra* notes 300–32.

364 *See generally* GOLDSTOCK, *supra* note 39, at 16–17.

365 *Id.*

366 *Id.* at 20. *See generally* Michael Vitiello, *The Permanent Subcommittee on Investigations Report on Hotel Employees & Restaurant Employees International Union: Will RICO Take a Walk on the Boardwalk with Local 54?*, 16 RUTGERS L.J. 671 (1985).

367 *See* TASK FORCE REPORT, *supra* note 31, at 16; Cressey, *supra* note 39, at 32.

368 H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 243 (1989).

369 *See* Lynch, *supra* note 64, at 773.

370 Reves v. Ernst & Young, 113 S. Ct. 1163, 1174 (1993).

371 Pitts et al., *supra* note 157, at 1.

372 *See supra* notes 193–281.

demonstrates frustration with RICO in the business setting in which RICO plaintiffs have sought deep pocket defendants.

Like many commentators and lower federal courts, the Supreme Court may finally have seen the shortsightedness of its earlier RICO decisions in which the Court refused to impose any meaningful limitations on RICO's expansive language. For example, *Sedima*, the case that most deeply divided the Court, offered an opportunity to limit RICO in cases involving garden variety common law fraud, often disputes about soured business deals, not about the kind of evil that produced RICO.[373] The Court's failure to do so has increased the pressure to limit RICO.[374]

This Article has argued that *Reves* may reflect concern about the same policies that troubled the *Sedima* dissenters.[375] Given the Court's deference to stare decisis in statutory construction cases,[376] the *Reves* court was not in a position to reexamine limitations rejected in *Sedima*. But the Court's failure to articulate its policy concerns has meant that post-*Reves* cases have been confusing.[377]

Contrary to the view among several lower federal courts,[378] *Reves* did not create a broad immunity for professionals.[379] Such an immunity would be contrary to congressional intent.[380] Congress recognized that the Mafia was able to maintain economic power through the use of professionals.[381] RICO was designed to reach men like Lucky Luciano[382] who could maintain control by directing others to commit predicate offenses. But RICO was intended to strike at the heart of organized crime, a goal which could not be accomplished by incarcerating only managers. Young muscle would remain ready to ascend to management positions.[383]

This Article has argued that Congress' intent, expressed in § 1962(c), can be achieved by focusing on the mens rea requirement and whether the actor's position in the organization makes the commission of the crime possible.[384] *Reves* does not foreclose what this Article has argued is a natural reading of §

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373 Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 525 (1985).

374 *See supra* notes 93–113.

375 *See supra* notes 152–89.

376 *See, e.g.*, Patterson v. McClean Credit Union, 491 U.S. 164, 172 (1989).

377 *See supra* notes 193–281.

378 *See supra* notes 193–251.

379 *Id.*

380 *Id.*

381 *See supra* notes 41–46.

382 *See generally* TASK FORCE REPORT, *supra* note 31, at 6–10; Cressey, *supra* note 39, at 54–56.

383 *See supra* notes 33–46, 63–67, 294–99.

384 *See supra* notes 303–32.

1962(c).[385]

With its decision in *Reves*, the Court has addressed most of RICO's substantive terms. It has resolved neither the mens rea question, an issue that would permit a more natural reading of § 1962(c) than that given by post-*Reves* decisions, nor the meaning of operation in its "operation or management" test. But given that the Court has addressed most of RICO's substantive provisions to date, the Court has little maneuvering room to produce meaningful limitations on runaway RICO.

In that sense, *Reves* was a step in the right direction. Despite the Court's urging, Congress has been unable to reform RICO. The Court should take what few opportunities it will have to limit RICO, but doing so in a manner consistent with Congress' clear intent to fight the Mafia.

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[385] *See supra* notes 301–69.